TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 192.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

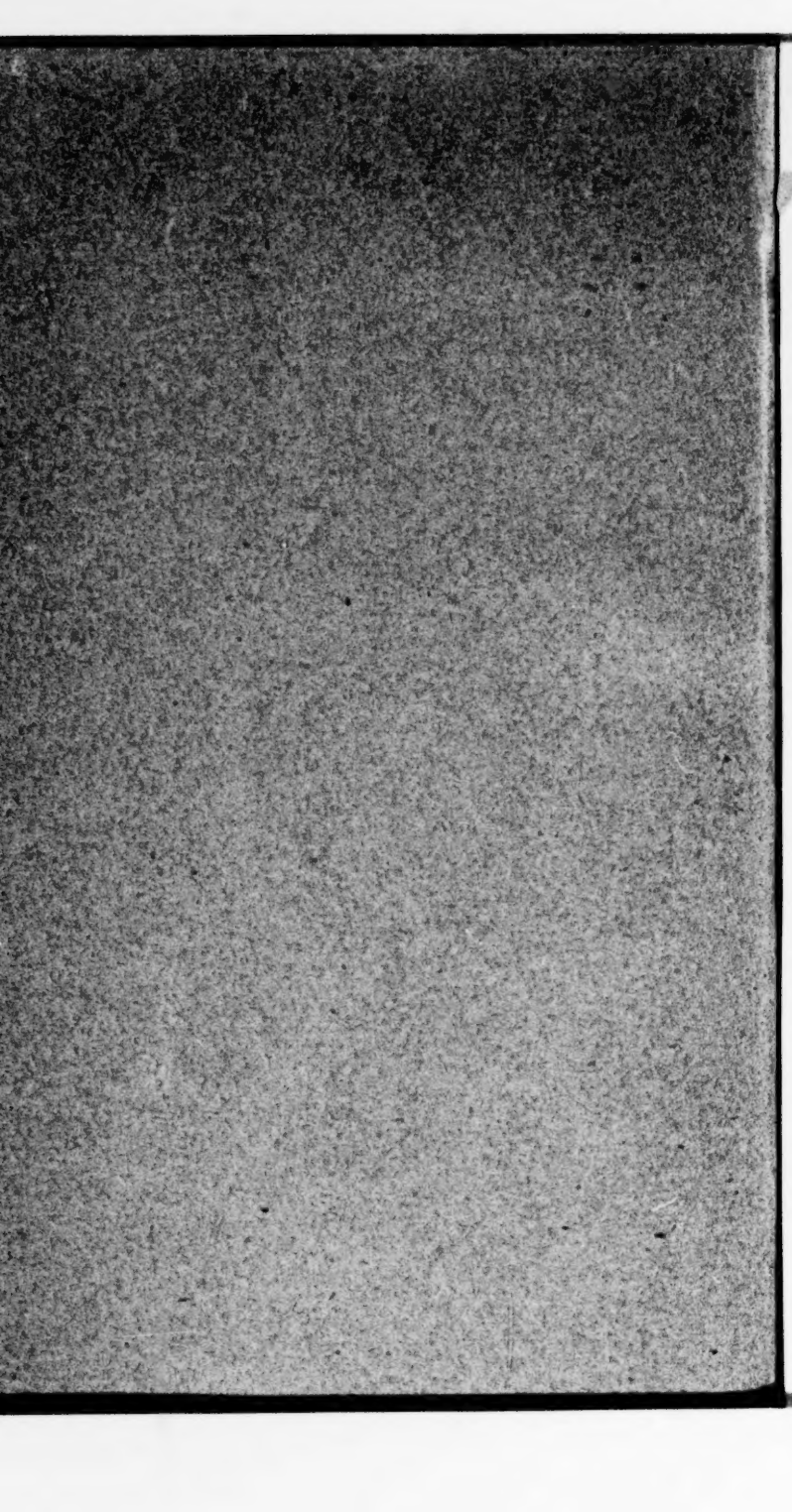
vs.

NELLIE PHINNEY, EXECUTRIX OF GUY C. PHINNEY, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 21, 1898.
CERTIORARI AND RETURN FILED MAY 17, 1898.

(16,545.)



(16,545.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 342.

HE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

ELLIE PHINNEY, EXECUTRIX OF GUY C. PHINNEY, DECEASED.

N WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the Circuit Court of the United States, District of Washington, Northern Division, holding terms at Seattle.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. — Dept. — Class —.

Complaint.

Comes now the above-named plaintiff, Nellie Phinney, executrix of the estate of Guy C. Phinney, deceased, and complains of the above-named defendant, the Mutual Life Insurance Company of New York, and for cause of action against said defendant alleges:

I.

That said defendant isa corporation duly organized, acting and existing under and by virtue of the laws of the State of New York, for the purpose of carrying on a life insurance business. Its principal place of business is in the city of New York, State of New York.

II.

That during all the times herein mentioned the plaintiff was and now is a resident, citizen and inhabitant of the State of Washington.

III.

That on or about the 24th day of September, 1890, said defendant, in consideration of the sum of thirty-seven hundred ($3,700) and seventy dollars to it in hand paid by one Guy C. Phinney, made, executed and delivered in said city and State of New York a certain contract of life insurance hereinafter set forth, whereby it insured the life of said Guy C. Phinney in the sum of one hundred thousand ($100,000) dollars. That defendant in said contract agreed to pay to the executors, administrators or assigns of said Guy C. Phinney, upon acceptance of satisfactory proof of the death of said Guy C. Phinney, the full sum of one hundred thousand ($100,000) dollars. That said contract is in words and figures as follows, to-wit:

No. 422,198. Age, 38 years.

THE MUTUAL LIFE INSURANCE CO.,
of New York.

Amount, $100,000. Premium, $3,770.

In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay, at its home office in the city of New York, unto Guy C. Phinney, of Seattle, in the county of King, State of Washington, his executors, administrators, or assigns, one hundred thousand dollars, upon acceptance of satisfactory proofs at its home office of the death of said Guy C. Phinney, during the continuance of this policy, upon the following conditions and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part thereof:

The annual premium of three thousand seven hundred and seventy dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the 24th day of September in every year during the continuance of this contract, until premiums for twenty full years shall have been daily paid to said company.

In witness whereof, The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the 24th day of September, one thousand eight hundred and ninety.

RICHARD A. McCURDY, President.

WM. J. EASTON, Secretary.

[Along the margin of the above is written in ink as follows:]

Man's life, twenty payment. W. J. Easton, Secretary.

The receipt of the first premium is hereby acknowledged.

Twenty year distribution policy.

Annual premium for 20 years.

Provisions, requirements, and benefits.

Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy,

and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. This policy shall become void by nonpayment of premium; all payments previously made shall be forfeited to the company, except as hereinafter provided.

Dividends.—This policy is issued on the twenty-year distribution plan. It will be credited with its distributive share of surplus apportioned after the expiration of twenty years from the date of issue. Only twenty-year distribution policies in force at the end of such term, and entitled thereto by year of issue, shall share in such distribution of the surplus, and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied at the end of such period to purchase additional insurance, or may then be drawn in cash. After the expiration of the period of twenty years hereinbefore provided for, the dividend distribution period shall be changed to terms of five years each during the continuance of this policy. The surplus may be applied at each distribution to purchase additional insurance without medical examination, provided such application of the surplus be elected in due form not less than two years before the end of the first dividend period of twenty years; otherwise, a satisfactory examination will be required for each such application of the surplus. But should the owner of the policy, at the end of said first period of twenty years, or at the end of any subsequent period of five years, elect to receive the dividend annually, the surplus applicable on this policy

will thereafter be apportioned at the beginning of each year on the anniversary of the date of this policy, and may be applied as hereinbefore provided.

Paid-up Policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof, before default in payment of any premium, or within six months thereafter, issue a non-participating policy, for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which the number of full years' premiums paid bears to the total number required.

Surrender.—This policy may be surrendered to the company at the end of said first period of twenty years, and the full reserve computed by the American Table of Mortality, and four per cent interest, and the surplus as defined above will be paid therefor in cash.

Insurance with Annuity.—If the policy be surrendered at the end of the first dividend period as above provided, the company will, if requested in writing, apply its cash value, including surplus, or any part of such value, to purchase without medical examination a paid-up policy for the same amount as the value so applied, securing insurance for life and participating annually in dividends, together with a paid-up annuity for life equal to three and one-half per cent per annum of the amount of the paid-up insurance, payments of the annuity to commence one year after the end of the first dividend period.

Incontestability.—It is hereby further promised and agreed that after two years from the date hereof, the only

conditions which shall be binding upon the holder of this policy are, that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age, and military and naval service in time of war, shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

Notice to the Holder of This Policy.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignment.—The company declines to notice any assignment of this policy until the original or duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

That the said application contained the agreement and condition, that the same was made subject to the laws of the State of New York. That a copy of said application is hereto annexed and marked Exhibit "A" and "B," and by reference thereto is hereby made a part hereof.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

IV.

That on the 12th day of September, in the year 1893, said Guy C. Phinney died in the city of Seattle, State of Washington. That his estate contains a large amount of real and personal property all situated and located in the said city of Seattle and county of King, State of Washington.

V.

That said Guy C. Phinney in his lifetime made and published his last will and testament, wherein he appointed said Nellie Phinney executrix thereof, to act without bonds and without the intervention of any Court, save to prove the execution of said last will and testament. That on or about the 19th day of September, 1893, said will was proved and admitted to probate in the Superior Court of the State of Washington in and for the county of King, and on said day she was duly appointed by said Court executrix thereof, and duly entered upon the discharge of her duties as such executrix.

VI.

That thereupon the plaintiff duly qualified and entered upon the discharge of her duties as executrix, and that said letters testamentary have not been revoked.

VII.

That during the lifetime of said Guy C. Phinney he duly performed all the conditions of said contract by him to be performed.

VIII.

That on or about the 11th day of July, 1894, the plaintiff notified said defendant that said Guy C. Phinney had

died on or about the 12th of September, 1893, and further asked defendant to let her know if defendant required any further preliminaries or required of plaintiff anything further to advise her, and she would comply therewith, and further requested defendant to pay said policy.

IX.

That on the 19th day of July, 1894, the said defendant, in reply to the above, informed and declared to plaintiff that said policy was forfeited on the 24th day of September, 1891, for nonpayment of premium, and that said policy had no value.

X.

That on or about the 27th day of August, 1894, said plaintiff made, executed, and delivered to said defendant good, sufficient, and satisfactory proofs of the death of said Guy C. Phinney, and again requested payment of said policy.

XI.

That on or about the 5th day of September, 1894, said defendant acknowledged receipt of said proofs, and made no objection to the kind, form, sufficiency, or quality of said proofs of death, and made no objection to said proofs in any manner whatsoever.

XII.

That said plaintiff has duly complied with all the conditions of said contract by her necessary to be complied with.

XIII.

That said plaintiff is the owner and holder of said con-

tract, and there is now due her from the said defendant the full sum of one hundred thousand dollars.

XIV.

That said defendant has wholly neglected to pay said policy or any part thereof.

Wherefore plaintiff prays for judgment against said defendant in the full sum of one hundred thousand dollars, with interest thereon from the 19th day of July, 1894, together with her costs and disbursements in this action.

S. WARBURTON,
Atty. for Plaintiff.

State of Washington, } ss.
County of King. }

Nellie Phinney, being first duly sworn, on her oath deposes and says that she is the plaintiff above mentioned; that she has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 13th day of September, 1894.

[Seal.] AXEL H. SOELBERG,
Notary Public in and for the State of Washington, residing at Seattle, King Co., Washington.

State of Washington, } ss.
County of King. }

Nellie Phinney, being first duly sworn, on her oath deposes and says that she is the plaintiff above named; that

she has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 15th day of January, 1895.

[Seal.] AXEL H. SOELBERG,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Complaint filed Sep. 24, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Refiled as amended. Refiled January 16, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Received copy of the within-amended complaint, and defendant has until the 25th day of January, 1895, in which to answer the same.

STRUDWICK & PETERS,

Attys. for Deft.

United States Circuit Court for the District of Washington.

NELLIE PHINNEY, Executrix,

vs.

MUTUAL LIFE INS. CO. OF NEW YORK.

Præcipe for Appearance.

To the Clerk of the above-entitled Court:

You will please enter my appearance as attorney for plaintiff in the above-entitled cause.

S. WARBURTON,

Att'y for Plf.

[Endorsed]: Praecipe for appearance filed Sept. 24, 1894. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy Clerk.

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

Summons.

Action brought in the said Circuit Court, and the complaint filed in the office of the clerk of said Circuit Court, in the city of Seattle, King County, State of Washington. The President of the United States of America, Greeting:

To the Mutual Life Insurance Company of New York.

You are hereby required to appear in the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Northern Division, at the city of Seattle, within twenty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiff now on file in the office of the clerk of said court, a copy of which complaint is herewith delivered to

you. And, unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in the complaint.

Witness, The Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 24 day of September, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence, the 119th.

[Seal.] A. REEVES AYRES, Clerk.

By R. M. Hopkins, Deputy Clerk.

United States Marshal's Office,
District of Washington.

I hereby certify that I received the within writ on the 24th day of Sept. 1894, and personally served the same on the 25th day of Sept. 1894, by delivering to and leaving with George R. Carter, agt. and assistant cashier of the Mutual Life Insurance Company of New York, said defendants named therein personally, at Seattle, county of King, in said district, a certified copy thereof, together with a copy of the complaint, certified to by R. M. Hopkins, clerk, attached thereto.

JAMES C. DRAKE, U. S. Marshal.

By E. V. Ruger, Deputy.

This 25th 1894.

Marshal's Fees.

To Service & Copy	$5.00
" Mileage 2 @ 12 per mile	.24
	$5.24

Paid Sept. 26th, '94.

E. V. Ruger, Dept. U. S. M.

[Endorsed]: Summons. Filed Sept. 25, 1894. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy Clerk.

In the Circuit Court of the United States, District of Washington, Northern Division.

N. PHINNEY, Ex'x,
vs.
MUT. LIFE INS. CO. OF N. Y.

Præcipe for Appearance of Defendant.

To the Clerk of the above-entitled Court:

You will please enter our appearance as attorneys for defendant in the above-entitled cause.

STRUDWICK & PETERS.

[Endorsed]: Præcipe for appearance, filed Oct. 18, 1894. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy Clerk.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

Demurrer to Complaint.

Comes now the defendant above named, by Strudwick

& Peters, its attorneys, and demurs to the complaint of the plaintiff herein filed, and for cause of demurrer, says:

I.

That this Court has no jurisdiction of the person of the defendant.

II.

That this Court has no jurisdiction of the subject matter of this action.

III.

That the said complaint does not state facts sufficient to constitute a cause of action against this defendant.

STRUDWICK & PETERS,

Attorneys for Defendant.

Certificate of Counsel.

I, R. C. Strudwick, of counsel for the defendant above named, the Mutual Life Insurance Company of New York, do hereby certify that, in my opinion, the foregoing demurrer is well founded, in point of law.

R. C. STRUDWICK.

[Endorsed]: Demurrer filed Nov. 26, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the Estate of Guy C. Phinney, Deceased.
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 418.

Affidavit of Nellie Phinney as to Loss of Policy.

State of Washington, } ss.
County of King, }

Nellie Phinney being first duly sworn, on her oath deposes and says, that she is the plaintiff in the above-entitled action; that the original policy mentioned in the complaint has been mislaid or lost; that she is unable to find it, and does not know where it is; that affiant is informed and believes that the above-named defendant has in its possession and control a duplicate or copy of said policy made by its agents or officers before the delivery of the original to Guy C. Phinney; that to the best of her knowledge and belief the copy set forth in the complaint is an exact copy of the original policy issued to Guy C. Phinney.

NELLIE PHINNEY.

Subscribed and sworn to before me this 1st day of Dec., 1894.

[Seal] AXEL H. SOELBERG,
Notary Public residing at Seattle, Washington.

[Endorsed]: Affidavit of Nellie Phinney. Filed Dec. 1, 1894. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

General Order Book No. 3. Page 44.
Saturday December 1, 1894.

MUTUAL LIFE INSURANCE CO.
vs.
NELLIE PHINNEY,

Order Overruling Demurrer.

Now, on this day this cause comes on to be heard upon demurrer to the complaint on file herein, and the Court, after hearing the argument of the respective counsel, and being sufficiently advised in the premises, overrules said demurrer, to which ruling of the Court in overruling said demurrer defendant excepts, and its exception is allowed. And defendant is allowed twenty days in which to answer.

And this cause coming further on to be heard upon defendant's exception to the interrogatories, and the Court, after hearing the argument of the respective counsel and being sufficiently advised in the premises, sustains said exception.

And this cause coming further on to be heard upon motion for inspection of policy, and the Court, after hearing argument of the respective counsel, and being sufficiently advised in the premises, denies said motion.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the Estate of Guy C. Phinney, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 418.

Answer.

Comes now the defendant above named, by Struelwick & Peters, its attorneys, and, answering the complaint of the plaintiff filed herein, says:

I.

It has no knowledge or information sufficient to form a belief as to whether the allegation contained in paragraph II of said complaint are true or untrue.

II.

It denies so much of paragraph III of said complaint as alleges that this defendant made or executed or delivered in the city and State of New York the contract of life insurance set forth in said paragraph.

III.

It admits that Guy C. Phinney died in the city of Seattle, State of Washington, on the 12th day of September, 1893. It has no knowledge or information sufficient to form a belief as to the other allegations, or any of them, contained in paragraph IV of said complaint.

IV.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph V of said complaint.

V.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph VI of said complaint.

VI.

It denies each and every allegation contained in paragraph VII of said complaint.

VII.

It denies each and every allegation contained in paragraph VIII of said complaint.

VIII.

It denies each and every allegation contained in paragraph X of said complaint.

IX.

It denies each and every allegation contained in paragraph XI of said complaint.

X.

It denies each and every allegation contained in paragraph XII of said complaint.

XI.

It denies each and every allegation contained in paragraph XIII of said complaint.

For the first affirmative defense, the defendant alleges:

I.

That this defendant is, and was at all the times mentioned in the complaint, created, organized, and existing under and by virtue of the laws of the State of New York, and is and was at all the said times engaged in transacting a life insurance business in the State of Washington, under and by virtue of and pursuant to the laws of the State of Washington aforesaid, having its principal office for the transaction of business in said State at the city of Seattle, Washington.

II.

That on or about the 22nd day of September, 1890, one Guy C. Phinney, being the same Guy C. Phinney named in the complaint, made, signed and delivered to defendant, at its office in Seattle aforesaid, written application to defendant for a policy of insurance upon his life in the sum of one hundred thousand ($100,000 dollars; which application became and was pursuant to its own terms and the terms of the policy hereinafter mentioned, a part of said policy and of the contract of insurance evidenced thereby.

III.

That said application contained, among other things, a stipulation and condition to the effect that the policy to be issued by defendant pursuant thereto, "shall not take effect until the first premium shall have been paid, and the policy shall have been delivered."

IV.

That thereupon the agent of defendant in Seattle aforesaid transmitted said application of the said Guy C. Phinney to the agent of defendant in San Francisco, California, by whom the said application was transmitted to defendant in the city and State of New York.

V.

That thereafter, to wit, on the twenty first day of October, 1890, defendant, pursuant to said application, transmitted the policy of insurance referred to in the complaint to its agent in San Francisco aforesaid, and thereafter, to wit, on the twenty eighth day of October, 1890, the agent of the defendant at San Francisco aforesaid transmitted the said policy of insurance to the agent of defendant in Seattle aforesaid for delivery of the same to the said Guy C. Phinney, provided the said Guy C. Phinney should pay to defendant in Seattle the premium due upon said policy; and said last-named agent in Seattle aforesaid, on or about the first day of November, 1890, delivered the said policy to said Guy C. Phinney, and the said Guy C. Phinney then and there paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in the complaint, as one of the conditions thereof, as follows:

"The annual premium of thirty seven hundred and seventy 37/0 Dollars shall be paid in advance on the date

ery of this policy, and thereafter to the company at its home office in the city and State of New York on the 24th day of September in every year during the continuance of this contract until premiums for twenty (20) full years shall have been duly paid to said company."

And it is therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the secretary or president. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy; and any further notice required by any statute is thereby expressly waived. That part of the yearly premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company."

VII

That pursuant to the conditions of said policy aforesaid there became and was due defendant, as a premium upon said policy of insurance on the 24th day of September, 1891, the sum of thirty-seven hundred and seventy ($3770) dollars; and the said Guy C. Phinney failed, neglected, and refused to pay the said sum of thirty-seven hundred and seventy ($3770) dollars, or any part thereof, and ever since that time up to the time of the death of the

said Guy C. Phinney he failed, neglected, and refused to pay to defendant the said sum or any part thereof, by reason whereof, the said policy of insurance became, on the 24th day of September, 1891, according to the conditions aforesaid, void and of no effect.

For a second affirmative defense, the defendant alleges:

I.

That after the delivery of the policy of insurance mentioned in the complaint to Guy C. Phinney in the manner aforesaid, and during the lifetime of the said Guy C. Phinney, said contract of insurance evidenced by the said policy was waived, abandoned, and rescinded by the parties thereto.

For a third affirmative defense the defendant alleges:

I.

That as a consideration of the contract of insurance mentioned in the complaint, and as a part thereof, and as a condition precedent to defendant's liability thereon, said Guy C. Phinney, before the issuance and delivery of the policy of insurance mentioned in the complaint, warranted to defendant as follows:

That he was temperate in his habits, and also that he had no acquired or hereditary predisposition to rheumatism or gout, and also that he had never had rheumatism or gout.

II.

That defendant issued and delivered to the said Guy C. Phinney the policy of insurance mentioned in the com-

plaint, in consideration of the warranties aforesaid, and of each of them, and upon the faith of the truth of the same and of each of them.

III.

That each and all of said warranties were, at the time the same were made as aforesaid, untrue; that in truth and in fact the said Guy C. Phinney at the time aforesaid, had an acquired and an hereditary predisposition to rheumatism and to gout, and had had rheumatism and gout. And in truth and in fact the said Guy C. Phinney, at the time aforesaid, was not temperate in his habits, but was, on the contrary, then addicted to the intemperate drinking of wines, spirits, and malt liquors.

For a fourth affirmative defense, the defendant alleges:

That as defendant is informed and verily believes plaintiff herein relies upon an alleged noncompliance by the defendant with the laws of the State of New York for the year 1876, chapter 311, as amended by the laws of the State of New York for the year 1877, chapter 321, and upon the construction of said law as claimed by the plaintiff that said law required notice thereunder to be sent by the defendant to residents of the State of Washington. Defendant alleges that said law, in so far as it may be construed to impose the duty of sending notices to residents outside of the State of New York in connection with policies which became completed contracts without the State of New York, and in so far as it may be construed not to permit any waiver of the sending of such notices by contract with the parties thereto, is invalid, in that it is in violation of and repugnant to the

Constitution of the United States, and said statute never became a law, and is void, and the particular grounds of said repugnance are that the said statute as aforesaid would be a denial to this defendant by the States of New York and Washington of the equal protection of their laws, and would be a deprivation by the said States of the property of the defendant without due process of law, and would be a regulation of commerce in the several States, and would interfere with the sovereignty of the State of Washington, and would affect property and business without the jurisdiction of the State of New York, and under the rights, titles, privileges, and immunities which belong to the defendant under the Constitution of the United States, and which it hereby severally sets up, and claims it was not obliged to send notice to the said Guy C. Phinney, and said law construed as aforesaid violates the Constitution of the United States in that it is a law impairing the obligation of contracts.

Wherefore the defendant prays to be hence dismissed with its costs.

STRUDWICK & PETERS,
Attorneys for Defendant.

United States of America,
District of Washington. } ss.

Wm. S. Pond, being first duly sworn, on oath says: That he is the manager for the State of Washington for defendant in the above-entitled action; that he has heard the foregoing answer read, knows the contents thereof, and believes the same to be true.

WM. S. POND.

Subscribed and sworn to before me this 24th day of Dec., A. D. 1894.

[Seal] W. A. PETERS.

Notary Public in and for Washington, residing at Seattle.

[Endorsed]: Answer filed Dec. 26, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Received a copy of the within answer this 24th day of December, 1894.

S. WARBURTON,
Attorney for Plf.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, Deceased, Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Demurrer to Answer.

Comes now the above named plaintiff by her attorney, S. Warburton, and demurs to the answer of defendant, as follows:

I.

Plaintiff demurs to the first affirmative defense set out in defendant's answer, and for cause of demurrer alleges that said first affirmative defense does not state facts sufficient t oconstitute a defense to paintiff's complaint.

II.

Plaintiff demurs to the second affirmative defense set forth in defendant's answer, and for cause of demurrer alleges that said second affirmative defense does not state facts sufficient to constitute a defense to plaintiff's complaint.

III.

Plaintiff demurs to the third affirmative defense set forth in defendant's answer, and for cause of demurrer alleges that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.

IV.

Plaintiff demurs to the fourth affirmative defense set forth in defendant's answer, and for cause of demurrer alleges that said affirmative defense does not state facts sufficient to constitute a defense to plaintiff's complaint.

S. WARBURTON,
Attorney for Plaintiff.

Certificate of Counsel.

I, S. Warburton, attorney for the plaintiff above named, do hereby certify that, in my opinion, each of the foregoing demurrers are well founded on point of law.

S. WARBURTON.

Received a copy of the within demurrer this 28th day of Dec., 1894.

STRUDWICK & PETERS.

[Endorsed]: Demurrer filed Dec. 28, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the Estate of GUY C. PHINNEY, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 418.

Answer to Amended Complaint.

Comes now the defendant above named, and, answering the amended complaint of the plaintiff filed herein, says:

I.

It has no knowledge or information sufficient to form a belief as to whether the allegations contained in paragraph II of said Amended Complaint are true or untrue.

II.

It denies so much of paragraph III of said Amended Complaint as alleges that this defendant made or executed or delivered in the city and State of New York, the contract of life insurance set forth in said paragraph, or that the consideration of said contract was other than is stated in said contract. It admits that a copy of said application is annexed to said complaint, and it admits that said application contains the following clause: "This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the com-

pany and the laws of the State of New York," and, except as hereinbefore admitted, it denies each and every allegation contained in said paragraph III.

III.

It admits that Guy C. Phinney died in the city of Seattle, State of Washington, on the 12th day of September, 1893. It has no knowledge or information sufficient to form a belief as to the other allegations or any of them contained in paragraph IV of said amended complaint.

IV.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them contained in paragraph V of said amended complaint.

V.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them contained in paragraph VI of said amended complaint.

VI.

It denies each and every allegation contained in paragraph VII of said amended complaint.

VII.

It denies each and every allegation contained in paragraph VIII of said amended complaint.

VIII.

It denies each and every allegation contained in paragraph X of said amended complaint.

IX.

It denies each and every allegation contained in paragraph XI of said amended complaint.

X.

It denies each and every allegation contained in paragraph XII of said amended complaint.

XI.

It denies each and every allegation contained in paragraph XIII of said amended complaint.

For a first affirmative defense, the defendant alleges:

I.

That the defendant is, and was at all the times mentioned in the amended complaint, a corporation, created, organized, and existing under the and by virtue of the laws of the State of New York, and is and was at all said times, engaged in transacting a Life Insurance business in the State of Washington, under and by virtue of, and pursuant to the laws of the State of Washington aforesaid, having its principal office for the transaction of business in said State, at the city of Seattle, Washington.

II.

That on or about the 22nd day of September, 1890, one Guy C. Phinney, being the same Guy C. Phinney named in the said complaint and who was at all times herein mentioned, a citizen and resident of the State of Washington, made, signed, and delivered to defendant, at its office in Seattle aforesaid, his written application

to defendant for a policy of insurance upon his life in the sum of one hundred thousand ($100,000) dollars, which application became and was, pursuant to its own terms, and the terms of the policy hereinafter mentioned, a part of said policy, and of the contract of insurance evidenced thereby.

III.

That said application contained, among other things a stipulation and condition to the effect that the policy to be issued by defendant pursuant thereto, "shall not take effect until the first premium shall have been paid, and the policy shall have been delivered."

IV.

That thereupon, the agent of defendant in Seattle aforesaid transmitted said application of the said Guy C. Phinney to the agent of defendant in San Francisco, California, by whom the said application was transmitted to defendant in the city and State of New York.

V.

That thereafter, to wit, on the twenty first day of October, 1890, defendant, pursuant to said application, transmitted the policy of insurance referred to in the said complaint, to its agent in San Francisco aforesaid, and thereafter, to wit, on the twenty eighth day of October, 1890, the agent of the defendant, at San Francisco, aforesaid, transmitted the said policy of insurance to the agent of defendant in Seattle, aforesaid, for delivery of the same to the said Guy C. Phinney, provided the said Guy C. Phinney should pay to defendant in Seattle, the premium due upon said policy; and said last named agent

in Seattle aforesaid, on or about the first day of November, 1890, delivered the said policy to said Guy C. Phinney, and the said Guy C. Phinney then and there paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in the said complaint, as one of the conditions thereof, as follows:

"The annual premium of thirty-seven hundred and seventy ($3,770) dollars, shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of and State of New York, on the 24th day of September in every year during the continuance of this contract until premiums for twenty (20) full years shall have been duly paid to said company."

And it was therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the secretary or president. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy; and any further notice required by any statute is hereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company."

VII.

That pursuant to the conditions of the said policy aforesaid, there became and was due to the defendant, as a premium upon said policy of insurance, on the 24th day of September, 1891, the sum of thirty-seven hundred and seventy ($3,770) dollars, and the said Guy C. Phinney failed, neglected, and refused to pay the said sum of thirty-seven hundred and seventy($3,770) dollars, or any part thereof, and ever since that time, and up to the time of the death of the said Guy C. Phinney, he failed, neglected, and refused to pay to defendant the said sum or any part thereof; by reason whereof, the said policy of insurance became, on the 24th day of September, 1891, according to the conditions aforesaid, void and of no effect.

For a second affirmative defense the defendant alleges:

I.

That after the delivery of the policy of insurance mentioned in the said complaint, to Guy C. Phinney in the manner aforesaid, and during the lifetime of the said Guy C. Phinney said contract of insurance evidenced by said policy was waived, abandoned, and rescinded by the parties thereto.

For a third affirmative defense, the defendant alleges:

I.

That as a consideration of the contract of insurance mentioned in the said complaint, and as a part thereof, and as a condition precedent to defendant's liability

thereon, said Guy C. Phinney, before the issuance and delivery of the policy of insurance mentioned in the complaint, warranted to defendant as follows:

That he was temperate in his habits, and also that he had no acquired or hereditary predisposition to rheumatism or gout, and also that he had never had rheumatism or gout.

II.

The defendant issued and delivered to the said Guy C. Phinney the policy of insurance mentioned in the said complaint, in consideration of the warranties, aforesaid, and of each of them, and upon the faith of the truth of the same, and of each of them.

III.

That each and all of said warranties were, at the time the same were made as aforesaid, untrue; that in truth and in fact the said Guy C. Phinney at the time aforesaid had an acquired and an hereditary predisposition to rheumatism and gout, and had had rheumatism and gout. And in truth and in fact the said Guy C. Phinney, at the time aforesaid, was not temperate in his habits, but was, on the contrary, then addicted to the intemperate drinking of wines, spirits, and malt liquors.

For a fourth affirmative defense, the defendant alleges:

That as defendant is informed and verily believes, plaintiff herein relies upon an alleged noncompliance by the defendant with the laws of the State of New York for the year 1876, chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321,

and upon the construction of the said law as claimed by the plaintiff that said law required notice thereunder to be sent by the defendant to residents of the State of Washington. Defendant alleges that said law in so far as it may be construed to impose the duty of sending notices to residents outside of the State of New York, in connection with policies which became completed contracts either within or without the State of New York and in so far as they may be construed not to permit any waiver of the sending of such notices by contract between the parties thereto, is invalid, in that it is in violation of and repugnant to the Constitution of the United States, and said statute never became a law, and is void, and the particular grounds of said repugnance are that the said statute as aforesaid would be a denial to this defendant by the States of New York and Washington of the equal protection of their laws, and would be a deprivation by the said States of the property of the defendant without due process of law, and would be a regulation of commerce in the several states, and would interfere with the sovereignty of the State of Washington, and would affect property and business without the jurisdiction of the State of New York, and under the rights, titles, privileges, and immunities which belong to the defendant under the Constitution of the United States and which it hereby severally sets up and claims it was not obliged to send notice to the said Guy C. Phinney, and said law violates the Constitution of the United States in that it is a law impairing the obligation of contracts.

Wherefore, the defendant prays to be hence dismissed with its costs.

E. LYMAN SHORT & STRUDWICK & PETERS,
Attorneys for Defendant.

United States of America,
District of Washington. } ss.

William S. Pond, being first duly sworn, on oath, says: That he is general agent for the State of Washington for defendant in the above-entitled action, and is an agent of defendant, authorized by defendant, to solicit insurance in the State of Washington; that he has heard the foregoing answer read, knows the contents thereof, and believes the same to be true; that he makes this affidavit on behalf of said defendant.

WM. S. POND.

Subscribed and sworn to before me this 24th day of January, 1895.

[Seal] JOHN D. ATKINSON,
Notary Public in and for the State of Washington, Residing at Seattle.

Received copy of within answer this 24th day of Jan'y, 1895.

S. WARBURTON,
By A. F. Burleigh,
Att'y for Pl'ff.

[Endorsed]: Answer to Amended Complaint. Filed Jan. 24, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

Appearance for Defendant.

To the Clerk of the United States Circuit Court for the Northern District of Washington:

Please enter my appearance as one of the solicitors for the defendant in the above action.

Dated Jan. 16, 1895.

EDWARD LYMAN SHORT.

[Endorsed]: Notice of appearance filed Jan. 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

Notice of Hearing.

To the above-named defendant and to Struidwick & Peters, its attorneys.

Please take notice that the above-named plaintiff herein will call up for hearing and argument the annexed demurrer on the 4th day of February, 1895, at 11 o'clock, A. M., in the above court, or as soon thereafter as counsel can be heard in the courtroom of said court in the city of Seattle, King county, Washington.

S. WARBERTON,

Attorney for Plaintiff.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 418.

Demurrer to Amended Answer.

Comes now the above-named plaintiff, by her attorney, S. Warburton, and demurs to the amended answer of defendant as follows:

I.

Plaintiff demurs to the first affirmative defense set out in defendant's amended answer, and for cause of demurrer alleges that said first affirmative defense does not state facts sufficient to constitute a defense to plaintiff's complaint.

II.

Plaintiff demurs to the second affirmative defense set forth in defendant's amended answer, and for cause of demurrer alleges that said second affirmative defense does not state facts sufficient to constitute a defense to plaintiff's complaint.

III.

Plaintiff demurs to the second affirmative defense set forth in defendant's amended answer, and for cause of

demurrer alleges that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.

IV.

Plaintiff demurs to the fourth affirmative defense set forth in defendant's amended answer, and for cause of demurrer alleges that said affirmative defense does not state facts sufficient to constitute a defense to plaintiff's complaint.

S. WARBURTON,
Attorney for Plaintiff.

CERTIFICATE OF COUNSEL.

I, S. Warburton, attorney for the plaintiff in the above-entitled action, do hereby certify that in my opinion each of the foregoing demurrers are well founded on point of law.

S. WARBURTON.

Received a copy of the within notice and demurrer this 28th day of January, 1895.

STRUDWICK & PETERS,
Attorneys for Defendant.

Notice and demurrer filed January 28, 1895, in the United States Circuit Court.

A. REEVES AYRES, Clerk.
By R. M. Hopkins, Deputy.

General Order Book No. 3. Page 194.

Tuesday, March 26, 1895

NELLIE PHINNEY, Executrix,
vs.
THE MUTUAL LIFE INSURANCE CO.

Order Sustaining Demurrer to Answer

Now on this day it is ordered by the court that the demurrer to the answer heretofore, on March 21st, 1895, taken under advisement, be and the same is hereby sustained as to the first, second, third, and fourth affirmative defenses; to which ruling of the Court in sustaining said demurrer defendant excepts, and its exception is allowed, and defendant is given twenty days in which to amend its answer.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the Estate of GUY C. PHINNEY, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. No. 418

Amended Answer to Amended Complaint.

Comes now the defendant above named, and by leave of the court files herein its amended answer to the plaintiff's amended complaint, and says:

I

It has no knowledge or information sufficient to form a belief as to whether the allegations contained in paragraph II of said amended complaint are true or untrue.

II

It denies so much of paragraph III of said amended complaint as alleges that this defendant made a contract or delivered in the city and State of New York the contract of life insurance set forth in said paragraph, or that the consideration of said contract was other than is stated in said contract. It admits that a copy of said application is annexed to said complaint, and it admits that said application contains the following clause: "This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York." And, except as hereinbefore admitted, it denies each and every allegation contained in said paragraph III.

III

It admits that Guy C. Phinney died in the city of Seattle, State of Washington, on the 12th day of September, 1894. It has no knowledge or information sufficient to form a belief as to the other allegations, or any of them, contained in paragraph IV of said amended complaint.

IV

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph V of said amended complaint.

V.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph VI of said amended complaint.

VI.

It denies each and every allegation contained in paragraph VII of said amended complaint.

VII.

It denies each and every allegation contained in paragraph VIII of said amended complaint.

VIII.

It denies each and every allegation contained in paragraph IX of said amended complaint, except the allegation that the defendant stated "that said policy had no value."

IX.

It denies each and every allegation contained in paragraph X of said amended complaint.

X.

It denies each and every allegation contained in paragraph XI of said amended complaint.

XI.

It denies each and every allegation contained in paragraph XII of said amended complaint.

XII.

It denies each and every allegation contained in paragraph XIII of said amended complaint.

For a first affirmative defense, the defendant alleges:

I

That the defendant is, and was at all the times mentioned in the amended complaint, a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is and was at all the said times engaged in transacting a life insurance business in the State of Washington, under and by virtue of, and pursuant to the laws of, the State of Washington aforesaid, having its principal office for the transaction of business in said State at the city of Seattle, Washington.

II

That on or about the 25th day of September, 1899, one Guy C. Phinney, named in the said complaint, and who was at all times herein mentioned a citizen and resident of the State of Washington, made, signed, and delivered to defendant, at its office in Seattle aforesaid, his written application to defendant for a policy of insurance upon his life in the sum of one hundred thousand ($100,000) dollars, which application became and was, pursuant to its own terms and the terms of the policy hereinafter mentioned, a part of said policy, and of the contract of insurance evidenced thereby;

III

That said application contained, among other things, a stipulation and condition to the effect that the policy to be issued by defendant pursuant thereto "shall not take effect until the first premium shall have been paid and the policy shall have been delivered."

IV.

That thereupon the agent of defendant in Seattle aforesaid transmitted said application of the said Guy C. Phinney to the agent of defendant in San Francisco, California, by whom the said application was transmitted to defendant in the State and city of New York.

V.

That thereafter, to-wit, on the twenty-first day of October, 1890, defendant, pursuant to said application, transmitted the policy of insurance referred to in the said complaint to its agent in San Francisco aforesaid; and thereafter, to-wit, on the twenty-eighth day of October, 1890, the agent of the defendant at San Francisco aforesaid transmitted the said policy of insurance to the agent of defendant in Seattle aforesaid, for delivery of the same to the said Guy C. Phinney, provided the said Guy C. Phinney should pay to defendant in Seattle the premium due upon said policy; and said last-named agent in Seattle aforesaid, on or about the first day of November, 1890, delivered the said policy to said Guy C. Phinney, and the said Guy C. Phinney then and there paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in the said complaint, as one of the conditions thereof, as follows:

"The annual premium of thirty-seven hundred and seventy ($3770) dollars shall be paid in advance on the

delivery of this policy, and thereafter to the company at its home office in the city and State of New York, on the 24th day of September in every year during the continuance of this contract until the premiums for twenty (20) full years shall have been duly paid to said company."

And it was therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the secretary or president. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy; and any further notice required by any statute is hereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company."

VII

That pursuant to the conditions of the said policy aforesaid there became and was due to the defendant, as a premium upon said policy of insurance, on the 24th day of September, 1891, the sum of thirty-seven hundred and seventy ($3770) dollars, and the said Guy C. Phinney failed, neglected, and refused to pay the said sum of thirty-seven hundred and seventy ($3770) dollars, or any part thereof, and ever since that time and up to the time

of the death of the said Guy C. Phinney, he failed, neglected, and refused to pay to defendant the said sum, or any part thereof, or any other sum, or other thing of value whatever; by reason whereof the said policy of insurance became, on the 24th day of September, 1891, according to the conditions aforesaid, void and of no effect.

For a second affirmative defense the defendant alleges:

I.

That at a time more than one (1) year from the time of issuance of the policy mentioned in the said complaint by the defendant to said Guy C. Phinney, and during the lifetime of said Guy C. Phinney, it was mutually agreed between the defendant and the said Guy C. Phinney, that the said contract of insurance should be waived, abandoned, and rescinded; and the said Guy C. Phinney and the defendant then mutually waived, abandoned, and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder; and in pursuance of said agreement said Guy C. Phinney delivered up the said policy of insurance to the defendant.

For a third affirmative defense the defendant alleges:

I.

That as a consideration of the contract of insurance mentioned in the said complaint, and as a part thereof, and as a condition precedent to defendant's liability thereon, said Guy C. Phinney, before the issuance and

delivery of the policy of insurance mentioned in the said complaint, warranted to defendant as follows:

That he was temperate in his habits, and also that he had no acquired or hereditary predisposition to rheumatism or gout, and that he had never had rheumatism or gout.

II.

That defendant issued and delivered to the said Guy C. Phinney the policy of insurance mentioned in the said complaint, in consideration of the warranties aforesaid, and of each of them, and upon the faith of the truth of the same and of each of them.

III.

That each and all of said warranties were, at the time the same were made, untrue; that in truth and in fact the said Guy C. Phinney, at the time aforesaid, had an acquired and an hereditary predisposition to rheumatism and to gout, and had had rheumatism and gout. And in truth and in fact the said Guy C. Phinney, at the time aforesaid, was not temperate in his habits, but was, on the contrary, then addicted to the intemperate drinking of wines, spirituous, and malt liquors.

Wherefore, the defendant prays to be hence dismissed with its costs.

E. LYMAN SHORT and
STRUDWICK & PETERS,
Attorneys for Defendant.

United States of America,
District of Washington. } ss.

Abraham W. Engle, being first duly sworn, on oath

deposes and says: That he is one of the agents for the State of Washington for the defendants in the above entitled action, authorized by defendant to solicit insurance in the State of Washington; that he has heard the foregoing amended answer read, knows the contents thereof, and believes the same to be true; that he makes this affidavit on behalf of said defendant because said defendant is a foreign corporation.

ABRAHAM W. ENGLE.

Subscribed and sworn to before me this 15th day of April, 1895.

[Seal.] C. E. REMSBERG,

Notary Public in and for the State of Washington, residing at Seattle.

Received a copy of this answer 15 April, 1895.

S. WARBURTON,

Attorney

By Douglas Young.

[Endorsed]: Amended Answer. Filed April 15, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, deceased,

Plaintiff,

vs

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 116

Reply to Affirmative Defense

Comes now the above named plaintiff, and in reply to the affirmative defense, says:

I

Plaintiff admits the allegations contained in the third paragraph of the first affirmative defense, and plaintiff further alleges that said application contained the further provision: I have paid $ to the subscribing soliciting agent, and have been furnished with binding receipt signed by the secretary of the company, to make the insurance herein applied for binding from date, providing the policy shall be issued by the company.

II

Plaintiff says she has no knowledge or information sufficient to form a belief as to the allegations contained in the fourth paragraph of the first affirmative defense.

III

Plaintiff says she has not sufficient knowledge or in-

formation to form a belief as to any of the allegations contained in paragraph five of the first affirmative, save the allegation that the policy referred to in plaintiff's complaint was delivered to Guy C. Phinney, and that the first premium was paid thereon. Plaintiff further alleges that the premium mentioned in said paragraph was paid on or about the 22nd day of September, 1890, and at the same time and place that application referred to in plaintiff's complaint and defendant's answer was delivered to said defendant.

IV.

Plaintiff denies each and every allegation contained in paragraph seven of defendant's first affirmative defense.

Reply to second affirmative defense.

Plaintiff denies each and every allegation contained in defendant's second affirmative defense.

For a first and further reply to the allegations contained in defendant's second affirmative defense plaintiff alleges:

I.

That said policy of insurance in said second affirmative defense contained the following agreement and condition:

Incontestability. It is hereby further promised and agreed that after two years from the date thereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after

the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II.

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1890.

That said Guy C. Phinney died on the 12th day of September, 1893. That during all the time, up to the time of his death on the 12th day of September, 1893, and more than two years after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's second affirmative defense plaintiff says:

I.

That the said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney, and just prior to his death, he informed and declared to plaintiff he was insured in defendant company in the sum of one hundred thousand dollars.

II.

That after his death and prior to the commencement of this action plaintiff, duly believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and, in order that she might procure the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to

the payment of said policy. That at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That therefore with full knowledge of all the facts it denied liability to plaintiff on the said policy on one ground only, viz: that said contract was forfeited on the 24th day of September, 1891, for nonpayment of premium, and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at great expense to herself procured the services of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and therefore did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of fifty dollars.

Reply to third affirmative defense.

I.

Plaintiff denies each and every allegation contained in paragraph one of defendant's third affirmative defense, not admitted or alleged to be true in plaintiff's complaint.

II.

Plaintiff says she has no knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph two of defendant's third affirmative defense.

III.

Plaintiff denies each and every allegation contained in paragraph three of defendant's third affirmative defense.

For a first and further reply to the allegations contained in defendant's third affirmative defense plaintiff alleges:

I.

That said policy of insurance mentioned in said second affirmative defense, contained the following agreement and condition:

Incontestability.—It is hereby further promised and agreed that after two years from the date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II.

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1890; that said Guy C. Phinney died on the 12th day of September, 1893; that during all the time up to the time of his death on the 12th day of September, 1893, and more than two years after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly

performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's third affirmative defense plaintiff says:

I.

That said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney and just prior to his death he informed and declared to plaintiff he was insured in defendant company in the sum of one hundred thousand dollars.

II.

That after his death and prior to the commencement of this action plaintiff, fully believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and, in order that she might procure the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to the payment of said policy; that at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That thereafter with full knowledge of all the facts it denied liability to plaintiff on the said policy on one ground only, viz: that said contract was forfeited on the 24th day of September, 1891, for nonpayment of premium, and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at a great expense to herself procured the services of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and therefore did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of fifty dollars.

Wherefore, plaintiff prays that she may have judgment against said defendant as prayed for in her complaint.

S. WARBURTON,
Atty. for Plaintiff.

State of Washington, } ss.
County of Pierce. }

Nellie Phinney, being first duly sworn, on her oath, deposes and says: That she is the plaintiff above named; that she has read the foregoing report, knows the contents thereof, and that the same are true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 23 day of April, 1895.

[Seal.] AXEL H. SOELBERG,
Notary Public in and for the State of Washington, residing in Tacoma.

[Endorsed]: Reply. Filed Apl. 23, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 418.

Second Amended Answer.

Comes now the defendant above named, and by leave of the Court files herein its Second Amended Answer to the plaintiff's amended complaint, and says:

I.

It has no knowledge or information sufficient to form a belief as to whether the allegations contained in paragraph II of said amended complaint are true or untrue.

II.

It denies so much of paragraph III of said amended complaint as alleges that this defendant made or executed or delivered in the city and State of New York the contract of life insurance set forth in said paragraph, or that the consideration of said contract was other than is stated in said contract. It admits that a copy of said application is annexed to said complaint, and it admits that said application contains the following clause:

"This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York," and, except as hereinbefore admitted, it denies each and every allegation contained in said paragraph III.

III.

It admits that Guy C. Phinney died in the city of Seattle, State of Washington, on the 12th day of September, 1893. It has no knowledge or information sufficient to form a belief as to the other allegations, or any of them, contained in paragraph IV of said amended complaint.

IV.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph V of said amended complaint.

V.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph VI of said amended complaint.

VI.

It denies each and every allegation contained in paragraph VII of said amended complaint.

VII.

It denies each and every allegation contained in paragraph VIII of said amended complaint.

VIII.

It denies each and every allegation contained in para-

graph IX of said amended complaint, except the allegation that the defendant stated that said policy had no value.

IX.

It denies each and every allegation contained in paragraph X of said amended complaint.

X.

It denies each and every allegation contained in paragraph XI of said amended complaint.

XI.

It denies each and every allegation contained in paragraph XII of said amended complaint.

XII.

It denies each and every allegation contained in paragraph XIII of said amended complaint.

For a first affirmative defense the defendant alleges:

I.

That the defendant is, and was at all the times mentioned in the amended complaint, a corporation, created, organized, and existing under and by virtue of the laws of the State of New York, and is and was at all the said times engaged in transacting a life insurance business in the State of Washington, under and by virtue of and pursuant to the laws of the State of Washington aforesaid, having its principal office for the transaction of business in said State, at the city of Seattle, Washington.

II.

That on or about the 22nd day of September, 1890, one Guy C. Phinney, being the same Guy C. Phinney named in the said complaint, and who was at all times hereinmentioned a citizen and resident of the State of Washington, made, signed, and delivered to defendant, at its office in Seattle aforesaid, his written application to defendant for a policy of insurance upon his life in the sum of one hundred thousand ($100,000) dollars; which application became and was, pursuant to its own terms and the terms of the policy hereinafter mentioned, a part of said policy and of the contract of business evidenced thereby.

III.

That said application contained, among other things, a stipulation and condition to the effect that the policy to be issued by defendant pursuant thereto "shall not take effect until the first premium shall have been paid and the policy shall have been delivered."

IV.

That thereupon the agent of defendant in Seattle aforesaid transmitted said application of the said Guy C. Phinney to the agent of defendant in San Francisco, California, by whom the said application was transmitted to defendant in the city of and State of New York.

V.

That thereafter, to-wit, on the twenty first day of October, 1890, defendant, pursuant to said application, transmitted the policy of insurance referred to in the said com-

plaint to its agent in San Francisco aforesaid; and thereafter, to-wit, on the twenty-eighth day of October, 1890, the agent of the defendant at San Francisco aforesaid transmitted the said policy of insurance to the agent of defendant in Seattle aforesaid, for delivery of the same to the said Guy C. Phinney, provided the said Guy C. Phinney should pay to defendant in Seattle the premium due upon said policy, and said last-named agent in Seattle aforesaid, on or about the first day of November, 1890, delivered the said policy to said Guy C. Phinney, and the said Guy C. Phinney then and there paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in said complaint, as one of the conditions thereof, as follows:

"The annual premium of thirty-seven hundred and seventy ($3770) dollars shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city and State of New York, on the 24th day of September in every year during the continuance of this contract until the premiums for twenty (20) full years shall have been duly paid to said company."

And it was therein further provided, as a condition of said contract as follows, to-wit:

"Each premium is due and payable at the home office in the city of New York, but will be accepted when duly made in exchange for the company's receipt, signed by the secretary or president. Notice that each and every such

payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy; and any further notice required by any statute is hereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company."

VII.

That pursuant to the conditions of the said policy aforesaid there became and was due to the defendant, as a premium upon said policy of insurance, on the 24th day of September, 1891, the sum of thirty-seven hundred and seventy ($3770) dollars; and the said Guy C. Phinney failed, neglected, and refused to pay the said sum of thirty-seven hundred and seventy ($3770) dollars, or any part thereof, and ever since that time and up to the time of the death of the said Guy C. Phinney he failed, neglected, and refused to pay to defendant the said sum, or any part thereof, or any other sum, or other thing of value whatever; by reason whereof, the said policy of insurance became, on the 24th day of September, 1891, according to the conditions aforesaid, void and of no effect.

For a second affirmative defense the defendant alleges:

I.

That at a time more than one (1) year from the time of issuance of the policy mentioned in the said complaint by the defendant to said Guy C. Phinney, and during the

lifetime of said Guy C. Phinney, it was mutually agreed between the defendant and the said Guy C. Phinney that the said contract of insurance should be waived, abandoned, and rescinded, and the said Guy C. Phinney and the defendant then mutually waived, abandoned, and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder; and, in pursuance of said agreement, said Guy C. Phinney delivered up the said policy of insurance to the defendant.

For a third affirmative defense the defendant alleges:

I.

That as a consideration of the contract of insurance mentioned in the said complaint, and as a part thereof, and as a condition precedent to defendant's liability thereon, said Guy C. Phinney, before the issuance and delivery of the policy of insurance mentioned in the said complaint, warranted to defendant as follows:

That he was temperate in his habits and that his former habit of drinking wine, spirits, and malt liquors was always temperate, and also that he had no acquired or hereditary predisposition to rheumatism or gout, and that he had never had rheumatism or gout.

II.

The defendant issued and delivered to the said Guy C. Phinney the policy of insurance mentioned in the said complaint, in consideration of the warranties aforesaid, and of each of them, and upon the faith of the truth of the same and of each of them.

III.

That each and all of said warranties were, at the time the same were made, untrue; that in truth and in fact the said Guy C. Phinney, at the time aforesaid, had an acquired and an hereditary predisposition to rheumatism and to gout, and had had rheumatism and gout. And in truth and in fact the said Guy C. Phinney, at the time aforesaid, was intemperate in his habits, and was then habitually addicted to the intemperate drinking of wines, spirits, and malt liquors; and in truth and in fact the said Phinney's former habit of drinking wines, spirits, and malt liquors had been intemperate, in that the said Guy C. Phinney for many years prior to said date had been constantly and habitually addicted to the intemperate drinking of wines, spirits, and malt liquors.

For a fourth affirmative defense the defendant alleges:

That on or about the —— day of December, 1891, the said Guy C. Phinney delivered and surrendered to defendant the policy sued on in this action, with the understanding and agreement then and there had between Guy C. Phinney and defendant that said policy had become lapsed and forfeited, and of no force and effect whatever; and that neither party thereto was thereafter to be bound thereby. And from said time until the death of said Phinney, on September 12th, 1893, and for nine months after the death of said Guy C. Phinney, the same was understood and agreed by plaintiff and by plaintiff's testator, Guy C. Phinney, and defendant to be a lapsed and forfeited policy; and by reason of such understanding and agreement, and by reason of such conduct of said

plaintiff and of plaintiff's testator, Guy C. Phinney, which was known to defendant, and relied upon by it, plaintiff is estopped from claiming, and ought not to be allowed to claim, that said policy is in force and effect, and binding upon defendant. Wherefore, the defendant prays to be hence dismissed with its costs.

E. LYMAN SHORT,
STRUDWICK & PETERS,
Attorneys for Defendant.

United States of America, }
District of Washington. } ss.

William S. Pond, being first duly sworn, on oath, deposes and says: That he is the general agent for the State of Washington for the defendant in the above entitled action, and is an agent of defendant, authorized by defendant to solicit insurance in the State of Washington; that he has heard the foregoing Second Amended Answer read, knows the contents thereof, and believes the same to be true; that he makes this affidavit on behalf of said defendant, because defendant is a foreign corporation.

WM. S. POND.

Subscribed and sworn to before me this 26 day of June, 1895.

[Seal.] C. E. REMSBERG,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Second Amended Answer. Filed July 1, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 418.

Answer to First Affirmative Defense.

Comes now the above-named plaintiff, and for an answer to the first affirmative defense set forth in defendant's Second Amended Answer says:

I.

She admits all the allegations of paragraph two, and further alleges that at the time of making such application said Guy C. Phinney paid to defendant the first premium on said policy, the receipt of which premium is acknowledged in said policy.

II.

Plaintiff, replying to the allegations contained in paragraph five of defendant's first affirmative defense, admits that on the 21st day of October, 1890, the defendant transmitted the policy of insurance mentioned in the complaint to defendant's agent in San Francisco, and that thereafter, on the 28th day of October, 1890, the agent of de-

fendant at San Francisco transmitted the said policy of insurance to the agent of defendant in Seattle for delivery of the same to said Guy C. Phinney; she also admits that on the first day of November, 1890, the agent in Seattle delivered the said policy to said Guy C. Phinney.

Plaintiff denies each and every other allegation contained in paragraph five of defendant's first affirmative defense, and further alleges that the payment of the first premium was made to the defendant concurrent with and at the same time the application was made and delivered to defendant for said policy of insurance.

III.

Plaintiff denies each and every allegation contained in paragraph seven of said first affirmative defense not admitted and alleged to be true in plaintiff's complaint.

Reply to second affirmative defense:

For a reply to the allegations contained in the first paragraph of the second affirmative defense plaintiff denies each and every allegation therein contained.

For a first and further reply to the allegations contained in defendant's second affirmative defense, plaintiff alleges:

I.

That said policy of insurance mentioned in said second affirmative defense contained the following agreement and condition:

Incontestability.—It is hereby further promised and agreed that after two years from the date hereof the only

conditions which shall be binding upon the holder of this policy are, that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II.

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1890.

That said Guy C. Phinney died on the 12th day of September, 1893; that during all the time up to the time of his death, on the 12th day of September, 1893, and more than two years from and after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's second affirmative defense plaintiff says:

I.

That the said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney, and just prior to his death, he informed and declared to plaintiff that he was insured in defendant company in the sum of one hundred thousand dollars ($100,000).

II.

That after his death and prior to the commencement of

this action plaintiff, fully believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and, in order that she might procure the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to the payment of said policy. That at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That thereupon, with full knowledge of all the facts, it denied liability to plaintiff on the said policy on one ground only, viz: that said contract was forfeited on the 24th day of September, 1891, for nonpayment of premium, and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff, knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at great expense to herself procured the services of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and thereupon did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of five hundred dollars ($500).

Reply to third affirmative defense.

I.

Plaintiff denies each and every allegation contained in paragraph one of defendant's third affirmative defense not admitted or alleged to be true in plaintiff's complaint.

II

Plaintiff says she has no knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph two of defendant's third affirmative defense.

III

Plaintiff denies each and every allegation contained in paragraph three of defendant's third affirmative defense.

For a first and further reply to the allegations contained in defendant's third affirmative defense plaintiff alleges:

I

That said policy of insurance mentioned in said second affirmative defense contained the following agreement and conditions:

Incontestability. It is hereby further promised and agreed that after two years from the date hereof the only conditions which shall be binding upon the holder of this policy are, that he shall pay the premiums at the time and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military services in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1890; that said Guy C. Phinney died on the 12th day of September,

1893; that during all the time up to the time of his death, on the 12th day of September, 1893, and more than two years after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's third affirmative defense plaintiff says:

I.

That said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney, and just prior to his death, he informed and declared to plaintiff that he was insured in defendant company in the sum of one hundred thousand dollars ($100,000).

II.

That after his death and prior to the commencement of this action plaintiff, fully believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and in order that she might procure the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to the payment of said policy. That at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That thereupon, with full knowledge of all the facts, it denied liability to plaintiff on the said policy on one ground only, viz., that said contract was forfeited on the 24th day of September, 1891, for nonpayment of premium,

and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff, knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at great expense to herself procured the service of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and therefore did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of five hundred dollars ($500).

Reply to fourth affirmative defense.

I.

Plaintiff denies each and every allegation contained in the fourth affirmative defense set forth in defendant's Second Amended Answer.

For a first and further reply to the allegations contained in the fourth affirmative defense plaintiff alleges:

I.

That said policy of insurance mentioned in said fourth affirmative defense contained the following agreement and condition:

Incontestability.—It is hereby further promised and agreed that after two years from the date hereof the only conditions which shall be binding upon the holder of this policy are, that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age and mili-

tary or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II.

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1890. That said Guy C. Phinney died on the 12th day of September, 1893. That during all the time up to the time of his death on the 12th day of September, 1893, and more than two years after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's fourth affirmative defense plaintiff says:

I.

That said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney, and just prior to his death, he informed and declared to plaintiff that he was insured in defendant company in the sum of one hundred thousand dollars ($100,000).

II.

That after his death and prior to the commencement of this action plaintiff, fully believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and, in order that she might procure

the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to the payment of said policy. That at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That thereupon, with full knowledge of all the facts, it denied liability to plaintiff on the said policy on one ground only, viz., that said contract was forfeited on the 24th day of September, 1891, for nonpayment of premium, and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff, knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at great expense to herself procured the services of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and therefore did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of five hundred dollars ($500).

Wherefore, plaintiff prays that she may have judgment against said defendant as prayed for in her complaint.

S. WARBURTON,
Atty. for Plff.

State of Washington, }
County of Pierce. } ss.

Nellie Phinney, being first duly sworn, on oath deposes and says: That she is the plaintiff above named; that she

has read the foregoing reply, knows the contents thereof, and that the same are true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 12th day of July, 1895.

.....

Notary Public in and for the State of Washington, residing at Tacoma.

Journal No. 2, page 67. Thursday, July 25, 1895.

NELLIE PHINNEY, Executrix, &c.,
vs.
MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Trial.

Now, on this 25th day of July, 1895, this cause comes on regularly for trial, in open Court, plaintiff being represented by S. Warburton, Esq., and A. F. Burleigh, Esq., and defendant represented by his counsel, Messrs. Strudwick & Peters, a jury being called, come and answer to their names, as follows:

A. Carlson,	T. M. Wheeler,	Gardner Kellogg,
Walter Creasey,	Frank Dean,	A. S. Reed,
E. J. Robinson,	Wm. Murray,	J. S. Upper and
John Alexander,	J. R. Van Alstine	L. D. Bruns.

twelve good and lawful men, duly empaneled and sworn, the trial proceeds by the examination of witnesses on the part of the plaintiff, at which time plaintiff having rested her case, the defendant moves for nonsuit, which motion is denied, to which ruling of the Court defendant excepts,

and its exception is allowed, and the cause proceeds by the examination of witnesses on behalf of defendant until the hour of adjournment, at which time, by consent of parties, it is ordered by the Court that this cause be, and the same is hereby, continued until to-morrow morning at ten o'clock, the 26th day of July, 1895, and, the Court having cautioned the jury, they are allowed to separate until that hour.

Journal No. 2, page 69. Friday, July 26, 1895.

NELLIE PHINNEY, Executrix

vs.

MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Trial (Continued).

And now the hour of ten o'clock A. M. having arrived, the plaintiff being represented by S. Warburton, Esq., and Andrew F. Burleigh, Esq., and defendant represented by its counsel, Messrs. Strudwick & Peters, the jury being called, come and answer to their names, all being present in their box, this cause proceeds by the examination of witnesses on behalf of defendant, and by examination of witnesses in rebuttal on behalf of plaintiff, and by the argument of counsel for plaintiff until the close thereof, at which time by consent of parties, it is ordered by the Court that this cause be, and the same is hereby continued until to-morrow morning at ten o'clock, the 27th day of July, 1895. And, the Court having cau-

tioned the jury, they are allowed to separate until that hour.

Journal No. 2, page 70.

Saturday, July 27, 1895.

NELLIE PHINNEY, Executrix,

vs.

MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Trial (Continued).

And now the hour of ten o'clock A. M. having arrived, the plaintiff being represented by S. Warburton, Esq., and A. F. Burleigh, Esq., and defendant represented by its counsel, Messrs. Strudwick & Peters, the jury being called, all answer to their names, all being present in their box, this cause proceeds by the argument of respective counsel until the close thereof.

Whereupon the jury are duly charged by the Court, and retire in charge of a sworn office to deliberate.

And now on this same day the jury return into open Court, all being present in their box, when through their foreman they present the following verdict.

"We, the jury in the above-entitled cause, find for the plaintiff, and assess her damages at $97,012.84.

"LOUIS D. BRUNS,

"Foreman."

Whereupon the jury are duly discharged from the cause.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix, &c.

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

No. 418.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess her damages at $97,012.84.

LOUIS D. BRUNS,
Foreman.

[Endorsed]: Verdict filed July 27, 1895, in the U S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

Notice of Motion for New Trial.

To the above-named plaintiff, Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney,

deceased, and to her attorneys, S. Warburton and Andrew F. Burleigh:

You, and all of you, will please take notice hereby that the above-named defendant intends to move and will move to vacate and set aside the verdict heretofore rendered herein, and for a new trial of the above-entitled action, upon the following grounds, to-wit:

1. Newly-discovered evidence material for this defendant, which it could not with reasonable diligence have discovered and produced at the trial.

2. Excessive damages appearing to have been given under the influence of passion or prejudice.

3. Error in the assessment of the amount of recovery, the same being too large.

4. Insufficiency of the evidence to justify the verdict, and that the same is against law.

5. Error in law occurring at the trial and excepted to at the time by the defendant.

Said motion will be made upon affidavits to be hereafter filed, and on the minutes of the court, and the pleadings and proceedings on file in the office of the clerk of the above-entitled court, and upon all the proceedings had and done in the above-entitled action.

E. LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Solicitors for Defendant.

Receipt of copy of above is hereby acknowledged.
July 29th, 1895.

A. F. BURLEIGH,
S. WARBURTON,
Attys. for Plff.

[Endorsed]: Notice of intention to move for new trial. Filed July 29, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased.
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Motion for New Trial.

Comes now the defendant and hereby moves the Court to vacate and set aside the verdict of the jury in the above-entitled action, and for a new trial thereof, upon the following grounds, to-wit:

1. Newly-discovered evidence material for this defendant, which it could not with reasonable diligence have discovered and procured at the trial.

2. Excessive damages appearing to have been given under the influence of passion and prejudice.

3. Error in the assessment of the amount of recovery, the same being too large.

4. Insufficiency of the evidence to justify the verdict, and that the same is against law.

5. Error in law occuring at the trial and excepted to at the time by the defendant.

This motion is made upon affidavits to be hereafter filed in accordance with the rules of this Court, and on the minutes of the Court, and the pleadings and proceedings on file in the office of the clerk of the above-entitled Court, and upon all the proceedings had and done in the above-entitled action.

E. LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Solicitors for Defendant.

Receipt of copy of above is hereby acknowledged this 29th day of July, 1895.

A. F. BURLEIGH,
S. WARBURTON,
Attys. for Plff.

[Endorsed]: Motion for new trial filed July 29, 1895, in the U S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
No. 418.

Motion to Dismiss.

Comes now the defendant in the above-entitled action, and moves the Court as follows:

I.

That the judgment in the above-entitled action be arrested, and that the Court refuse to enter judgment on the verdict herein, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof or of the parties to said action.

II.

That the Court dismiss the above-entitled action, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof or of the parties to said action.

III.

That the Court will render judgment in favor of the defendant and against the plaintiff for the dismissal of this action, notwithstanding the verdict herein, for that it manfestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof or of the parties to said action.

This motion is based upon the files, records, and proceedings of this Court in the above-entitled cause, and upon all the testimony and evidence introduced upon the trial thereof.

E. L. SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Attorneys for Defendant.

Recd. service of this motion this 10th day of Aug., 1895.

S. WARBURTON,
A. F. BURLEIGH,
Attorneys for Plff.

Motion filed Aug. 10, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Administratrix of the Last Will and Testament of GUY C. PHINNEY, Deceased, Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Order Extending Time to File Bill of Exceptions.

This cause coming on duly and regularly to be heard upon the application of the defendant for an extension of time in which to appear, serve, and file a bill of exceptions herein to be used upon appeal, and the Court, being now fully advised in the premises, it is

Ordered, that the said defendant have until and including the 29th day of August, A. D. 1895, to prepare and file a bill of exceptions herein to be used upon appeal; and that the time of said defendant be and the same hereby is extended until and including the 29th day of August, A.

D. 1895, in which to prepare, file, and serve such bill of exceptions.

Done at the June Term of the above-entitled Court in open Court this 30th day of July, A. D. 1895.

C. H. HANFORD,
Judge.

[Endorsed]: Order extending time for bill of exceptions. Filed July 30, 1895, in the U S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

Order Extending Time to File Bill of Exceptions.

This cause coming on duly and regularly to be heard upon the application of the defendant for a further extension of time in which to prepare, serve, and file a bill of exceptions herein, to be used upon appeal, and the Court being now fully advised in the premises, it is

Ordered, that the said defendant have until and including the 16th day of September, A. D. 1895, to prepare and file a bill of exceptions herein to be used upon appeal; and

that the time of said defendant be and the same hereby is extended until and including the 16th day of September, A. D. 1895, in which to prepare, file, and serve such bill of exceptions.

Done at the June term of the above-entitled Court in open Court this 26th day of August, 1895.

C. H. HANFORD,
Judge.

O.K. A. F. B.

[Endorsed]: Order filed Aug. 26, 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix, &c.,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

Order Continuing Motion.

This cause coming on this day to be heard upon the motion of defendant to settle and allow its bill of exceptions herein, and upon the amendments to said bill proposed by said plaintiff and upon defendant's dissent to said amendments, it is ordered by the Court that the hearing of said motion be and the same is hereby continued until Thursday the 17th day of October, 1895, at 10 o'clock A. M.

Dated 16 Oct. 1895.

C. H. HANFORD,
Judge.

[Endorsed]: Order filed Oct. 16, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 418.

Stipulation and Order.

It is hereby stipulated by and between the parties to this action by their respective attorneys that said plaintiff may have ten days' additional time from September 19, 1895, in which to file amendments to the bill of exceptions prepared by defendant, and that an order granting said ten days may be signed by the Court.

S. WARBURTON & A. F. BURLEIGH,
Attorneys for Plaintiff.

E. L. SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Attorneys for Defendant.

On reading and filing the above stipulation, it is ordered that the plaintiff's time for filing amendments to the bill of exceptions tendered and filed by the defendant may be

and the same is hereby, extended ten days from September 19, 1895.

C. H. HANFORD,
Judge.

[Endorsed]: Order filed Sept. 19, 1895. A. Reeves Ayres. Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the Estate of GUY C. PHINNEY, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
} No. 418.

Notice of Dissent.

To the plaintiff above named, and to S. Warburton, Esquire, and A. F. Burleigh, her attorneys.

Comes now the Mutual Life Insurance Company of New York, the defendant above named, and gives notice to the plaintiff above named, and to S. Warburton, Esquire, and A. F. Burleigh, Esquire, her attorneys, that the said defendant dissents from the amendments, and each of them proposed by plaintiff to the said defendant's proposed bill of exceptions, served and filed herein, which said proposed amendments to said proposed bill of exceptions were served on said defendant on the 28th day of September, 1895. The said defendant further gives notice to said

attorneys, and to said plaintiff, that on Thursday, the 3rd day of October, 1895, at the hour of 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the courtroom of said Court in the city of Seattle, Washington, that the said defendant will present the proposed bill of exceptions and said proposed amendments to the judge of said Court for settlement.

Dated this 30th day of September, 1895.

E. L. SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Attorneys for Defendant.

Recd. copy of within notice this 30 day Sept. 1895:

A. F. BURLEIGH,
J. E. W.

[Endorsed]: Notice filed Oct. 1st, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By E. A. Colvin Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 418.

Order of Continuance.

In the above-entitled action, the defendant having duly served and filed herein its proposed bill of exceptions, and

the plaintiff having duly served and filed herein her proposed amendments thereto, and the defendant having duly notified the plaintiff of its dissent to said amendments, and each of them, and that on this day it would present to the Court its proposed Bill of Exceptions and said proposed amendments for settlement, and said defendant having, on this day, duly presented said proposed Bill of Exceptions and said proposed amendments to the Court for settlement.

It is now, upon motion of the plaintiff, ordered by the Court that the hearing of said matter and the settlement of said Bill of Exceptions and said amendments thereto be, and the same is hereby, continued until the 16th day of October, 1895, at 10 o'clock A. M.

C. H. HANFORD,
Judge.

Dated this 3d day of October, 1895.

[Endorsed]: Order filed Oct. 3, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

General Order Book No. 3. Page 408.

Monday, October 7, 1895.

NELLIE PHINNEY, Executrix,
vs.
THE MUTUAL LIFE INSURANCE CO.

Order.

Now on this day it is ordered by the Court that the motion to dismiss this action for want of jurisdiction, heretofore, to-wit, on October 5, 1895, taken under advisement, be and the same is hereby denied.

NELLIE PHINNEY, Executrix,
vs.
THE MUTUAL LIFE INSURANCE CO.

Order.

Now on this day it is ordered by the Court that the motion for a new trial heretofore, to-wit, on October 5th, 1895, taken under advisement, be and the same is hereby denied, to which ruling of the Court, in denying said motion, defendant excepts, and his exception is allowed.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 418.

Judgment.

The above cause having heretofore come on for trial on the 25th day of July, 1895, and the jury having been regularly empaneled, and the Court having heard the proofs and allegations of the parties, and Stanton Warburton, A. F. Burleigh, and Murray and Christian appearing for the plaintiff, and E. Lyman Short, Strudwick and Peters, and Stratton, Lewis and Gilman appearing for defendant, and the case having been submitted to the jury upon the instructions of the Court and allegations of the parties,

the jury having retired to consider the evidence, and having returned a verdict in open Court in favor of the plaintiff and against the defendant in the sum of ninety-seven thousand and twelve and 84-100 dollars ($97,012.84), on the 27th day of July, 1895, and now, upon the application of plaintiff for judgment,

It is Ordered, Considered, and Adjudged that the plaintiff, Nellie Phinney, executrix of the estate of Guy C. Phinney, deceased, do have and recover of and from the defendant, The Mutual Life Insurance Company of New York, the full sum of ninety-seven thousand and twelve and 84-100 dollars ($97,012.94) in lawful money of the United States, together with interest at the rate of 7% per annum from the 27th day of July, 1895, together with her costs and disbursements in this action taxed at one hundred fifty-eight and 54-100 dollars ($158.54).

To the rendering of the foregoing judgment, defendant duly excepts, and its exception is allowed by the Court.

Dated October 17, 1895.

C. H. HANFORD,

Judge.

[Endorsed]: Judgment filed October 17th, 1895. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Last Will and Testament of GUY C PHINNEY, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 418.

Order that Proposed Bill of Exceptions be Amended.

In the above-entitled action, tried at June term, 1895, of the above-entitled court, the jury having returned a verdict in favor of plaintiff, on the 27 day of July, 1895, for the sum of ninety-seven thousand twelve and 84-100 ($97,012.84) dollars, and the court having by consent of plaintiff, and at the request of the defendant, made an order extending the time of defendant to prepare, serve, and file its Bill of Exceptions herein until the 28th day of August, 1895, and before the expiration of said time, to-wit, on the 26th day of August, 1895, the court, by consent of plaintiff, and at the request of defendant, having further extended the time of said defendant to prepare, serve, and file its Bill of Exceptions herein, until the 16th day of September, 1895, and the said defendant having, on the 14th day of September, filed herein its proposed Bill of Exceptions and served a copy thereof upon the attorneys of plaintiff, and the Court having by consent of

the defendant, and at the request of plaintiff, made an order extending the time of said plaintiff to prepare, serve, and file her objections and amendments to said proposed Bill of Exceptions, until the 29th day of September, 1895, and said plaintiff having, on September 28th, 1895, served upon defendant, and filed herein her objections and amendments to said defendant's proposed Bill of Exceptions, and said defendant having on the 30th day of September, 1895, notified said plaintiff and her attorneys of its dissent to said proposed amendments, and to each of them, and that on the 3d day of October, 1895, at 10 o'clock A. M. or as soon thereafter as counsel could be heard, at the courtroom of said Court, in the city of Seattle, Washington, it would present the proposed Bill of Exceptions and said amendments to the Judge of said Court for settlement, and the defendants having, at the time and place aforesaid, presented said proposed Bill of Exceptions and said proposed amendments to said Judge for settlement, and the Court thereupon, upon motion of the plaintiff having made an order continuing the settlement of said proposed Bill of Exceptions of defendant, and said proposed amendments of plaintiff, and said defendants dissent to said amendments until the 16th day of October, 1895, at 10 o'clock A. M. and upon said 16th day of October, 1895, the said Court having made and entered its order continuing said matter until the 17th day of October, 1895, at the same hour, now upon this 17th day of October, 1895, the said matter coming on regularly to be heard, the plaintiff appearing by her attorneys, S. Warburton, Esq., and A. F. Burleigh, Esq., and the defendant appearing by its attorneys, E. Lyman Short, Strudwick

& Peters, and Stratton, Lewis & Gilman, and the same being heard, it is

Ordered by the Court that the said proposed Bill of Exceptions of defendant be amended as proposed by plaintiff, in the following particulars only, to-wit:

I.

Add at the end of Exception No. 20 (page 22), of said proposed Bill of Exceptions, the matter contained in pages 16½ to 20½ inclusive, of said proposed amendments, except that the dates of the proceedings set forth on page 20½ thereof are to be given, and add at the end of page 20 thereof "and plaintiff thereafter made a similar demand upon defendant."

II.

Strike out the last clause of Exception No. 21 (page 22 of said bill), of said bill, and insert the following in lieu thereof:

"The evidence relating to the matters referred to in said requested instruction, is set forth in Exception No. 20."

III.

Strike out the last clause of Exception No. 22 (page 23) of said proposed bill, and insert the foregoing in lieu thereof.

"The evidence relating to the matters referred to in said requested instruction, is set forth in Exception No. 20."

IV.

Add on page 31 of the proposed bill, the testimony of Mrs. Nellie Phinney, plaintiff, on redirect examination,

as found on pages 21 and 22 of proposed amendments filed herein.

V.

Strike out the last clause of exception No. 24 (page 34) of said proposed Bill of Exceptions, and insert the following in lieu thereof:

"The evidence relating to the matters referred to in said requested instruction, is set forth in exception No. 20."

VI.

Strike out the last clause of exception 25 (page 35) of said proposed Bill of Exceptions, and insert the following in lieu thereof:

"The evidence relating to the matters referred to in said requested instruction, is set forth in exception No. 20."

VII.

Add at the end of exception No. 26 (page 36), the following:

"The other evidence relating to the matters referred to in said requested instruction, is set forth in exception No. 20."

VIII.

Strike out the thirteenth and fourteenth lines of exception No. 29 (page 173) of said proposed Bill of Exceptions, the words: "and nothing in the pleadings upon which such evidence could be introduced," and add at the end of said exceptions the matter contained on pages 28 and 29 of said proposed amendments, being a portion of the deposition of W. J. Easton.

IX.

And on page 34 of proposed bill, 12th line, "Reference is also made to all the evidence set forth under the 20th exception."

It appearing to the Court that the said proposed Bill of Exceptions has been amended as herein directed, let the same be settled, allowed, and certified.

Done in open Court, at the June term, 1895.

Dated October 17th, 1895.

C. H. HANFORD,

Judge.

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed, and settled, and made a part of the record herein.

Done in open Court, at the June term, 1895, and dated this 17th day of October, 1895.

.....,

Judge.

[Endorsed]: Order filed Oct. 17, 1895, in the U S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

Objections to Defendant's Proposed Bill of Exceptions.

Comes now the above-named plaintiff, Nellie Phinney, executrix, and objects to signing or allowing the defendant's proposed Bill of Exceptions as follows:

First.

Plaintiff objects to the Court's signing or allowing the first exceptions proposed by the defendant in its proposed bill of exceptions upon the following grounds:

1. That there was other competent, relevant, and material testimony given by the witness Stinson upon the question then under examination.

2. That certain parts of the testimony of said witness Stinson that was relevant, competent, and material to the question then under examination was suppressed and not set forth in the said exception, in this, that following the word "blank" in the third line of said exception on the

second page of said Bill of Exception the witness said "am not positive about it."

3. That said proposed exception is untrue in this, that in the tenth line of said exception the following language occurs: "I communicated to Mr. Phinney the result of my visit and application to Dr. Eagleson for a certificate of health."

Whereas, in truth and in fact, the witness did not so testify.

Second.

Plaintiff objects to the Court's signing or allowing the third exception in defendant's proposed Bill of Exceptions, on the ground that it does not contain all the evidence properly relating to the subject matter therein referred to.

Third.

Plaintiff objects to the Court signing or allowing the third exception set forth in defendant's proposed Bill of Exceptions upon the ground that said exception as proposed sets forth more than what in fact occurred at the time, in this that counsel for the defendant in their said proposed exception said that they objected to the question propounded to the witness Forbes, upon the ground that it was competent, irrelevant, and immaterial and not proper rebuttal. Whereas in fact they objected to the said question upon the ground only that the same was incompetent and not proper rebuttal.

Fourth.

Plaintiff objects to the Court signing or allowing the fourth proposed exception set forth on page six of the Bill of Exceptions proposed by defendant wherein it says

that, "the defendant duly excepted in writing to the refusal of the Court to give said instructions," on the ground that said defendant did not except to said instructions in writing. Plaintiff further objects to the Court granting said exception five on the ground that said instruction mentioned in said exception was 1 to 27 instructions requested by defendant. That said defendant did not separately except to the refusal of the Court to give any single instruction requested, and did not point out to the Court the ground or reason for its exception to the refusal of the Court to give said or any one of said 27 requests to instruct, but simply took one general exception to the refusal of the Court to give its 27 requested instructions in the following language only: "Defendant excepts to the refusal of the Court to give the instructions requested numbered from 1 to 27 inclusive." That no other exception was taken by defendant to said requested instruction in said exception mentioned than that above quoted.

Fifth.

Plaintiff objects to the Court allowing and signing defendant's proposed exception number five on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Sixth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number six on the same grounds and in the same manner set forth in plaintiff's objection to defendant's proposed Bill of Exception number four.

Seventh.

Plaintiff objects to the Court allowing or signing defendant's proposed Bill of Exception number seven on the same grounds and in the same manner in which plaintiff objects to defendant's proposed exception number four, and on the further ground that said exception does not speak the truth, wherein it says "it was established by positive evidence that Phinney did not tender any premium subsequent to the first at the date the same fell due."

Eighth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number eight on the same grounds and in the same language in which plaintiff objects as above set forth to defendant's proposed exception number four.

Ninth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number nine on the same grounds and in the same manner in which plaintiff objects as above set forth in defendant's proposed exception number four.

Tenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number ten on the same grounds and in the same language in which plaintiff objects as above set forth to defendant's proposed exception number four.

Eleventh.

Plaintiff objects to the Court allowing or signing de-

fendant's proposed exception number eleven on the same ground and in the same language in which plaintiff objects as above set forth to defendant's proposed exception number four.

Twelfth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twelve on the same grounds and in the same manner in which plaintiff objects as above set forth, to defendant's proposed exception number four, and also on the further ground that the statement in said exception that there was no evidence introduced of any tendering of premium after the year 1891 is not true.

Thirteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number thirteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Fourteenth.

Plaintiff objects to the Court signing or allowing defendant's proposed exception number fourteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Fifteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number fifteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Sixteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number sixteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Seventeenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number seventeen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Eighteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number eighteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four

Nineteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number nineteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twentieth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four, and also on the further ground that said proposed exception does not contain all the evidence relevant to the subject matter therein referred to.

Twenty-first.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-one on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-second.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-two on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-third.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-three on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-fourth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-four on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-fifth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-five on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-sixth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-six on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-seventh.

Plaintiff objects to the Court signing or allowing defendant's proposed exception number twenty-seven on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-eighth.

Plaintiff objects to the Court signing or allowing defendant's twenty-eighth proposed exception wherein it says: "That while the jury were still at the bar defendant duly excepted in writing and its exception was allowed by the Court," on the ground that no exception was taken to said instruction of the Court in writing.

Twenty-ninth.

Plaintiff objects to the Court allowing and signing defendant's proposed exception number twenty-nine wherein it states "nothing in the pleadings on which such evidence could be introduced," on the ground that no such exception was taken; also to that part of the twenty-ninth exception wherein it says "defendant duly excepted in writing," on the ground that no exception was taken to said instruction in writing. Plaintiff also objects to said defendant's exception on the ground that defendant did not take any exception at all applicable to that part

of the instruction of the Court quoted, and on the further ground that the twentieth and twenty-third exception does not state all the facts in said cause relating to a rescission of the contract, but on the contrary much evidence thereto is contained in defendant's proposed exception number twenty-seven.

Thirtieth.

Plaintiff objects to the Court allowing and signing defendant's proposed exception number thirty on the ground that defendant did not except to said instruction of the Court in writing, and on the further ground that all the evidence in relation to said instruction with reference to the rescission of the contract or surrender of the policy is not fully set forth in defendant's proposed exception number twenty and twenty-three, but a large part of it is contained in defendant's proposed exception number twenty-seven.

Thirty-first.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number thirty-one on the ground that said exception was not taken in writing as therein specified, and upon the further ground that said answer of the Court was in response to four questions asked by the jury of the Court to which he responded as in the proposed exceptions number thirty-one, thirty-two, thirty-three, and thirty-four, and after said questions were answered, defendant, by its attorney, excepted to said four answers by the Court, not alone and separate, but as follows: "While the jury was still at the bar the defendant excepted to the additional instructions given by the

Court to the jury, and to each of them as embodied in the questions and answers thereto, and requested that the instructions given be modified." Whereupon the Court said, "your exceptions are allowed, and if it is necessary to have a Bill of Exceptions show that these questions were answered by the Court and exceptions allowed to each one of them, and also that you asked to have a modification of the instructions by the substantial repetition of the instruction which the Court gave in regard to the abrogation of the contract by agreement between Stinson and Phinney. Your request for modification refused and exception allowed."

Thirty-second.

Plaintiff objects to the Court allowing and signing defendant's proposed exception number thirty-two on the same ground as specified in plaintiff's exception to exception number thirty-one.

Thirty-third.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number thirty-three on the same grounds mentioned in her exceptions to number thirty-one.

Thirty-fourth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number thirty-four on the same ground excepted to by her as specified and set forth in exception number thirty-one.

Plaintiff moves this Honorable Court to amend defendant's proposed Bill of Exceptions as follows, to-wit:

First.

Plaintiff asks the Court to amend defendant's proposed exception number one by inserting after the word "blank" in the third line on the second page of said proposed Bill of Exceptions, the following words, to-wit: "I am not positive about that," also to strike out from said exception the following words, "I communicated to Mr. Phinney the result of my visit and application to Dr. Eagleson for a certificate of health." Also asks that the following words be inserted: "Now in the case of Mr. Phinney, was such notice sent by you, that is, before the second year's premium matured?"

A. I presume it was. I sent them to all the policy holders.

Q. What did Phinney do in response to that notice, if anything?

A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company, and asked me if I could not take his notes for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company and they would take only cash. I think a few days before it was due, perhaps three or four days, I met him again and we had a similar conversation, and I told him about the same again, that I was unable to carry his notes, that I did not have the cash to put up to the company.

Q. Did he ever make payment of that premium to you?

A. Not to me, no sir.

Q. Who else in this State was authorized to receive and collect premiums? A. No one.

Q. Now did the time limited for the payment of premium—that expired without the payment of the premium I understand?

Objected to by plaintiff's counsel as calling for a conclusion.

The Court.—That is an unimportant question.

Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due and was unpaid with reference to this particular premium?

A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten days, I should say between one and two weeks after it was due, he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it, and he then told me that he was prepared to pay the premium.

Q. What did he ask you to do?

Objected to as leading by plaintiff's counsel.

Q. What, if anything, did he ask you to do?

Objection overruled; exception allowed.

A. He told me if I would bring the renewal receipt, or words to that effect, that he would pay the premium.

Q. State what occurred between you, what you said to him, and what he said to you.

A. I told him that I could not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank—I am not positive about that. He told me that he did not think that he

could pass for a certificate of health, from the fact that he had been rejected from the Equitable a few days before.

Q. Now, were any steps taken by you or by Mr. Phinney, to your knowledge, to ascertain whether or not he could obtain a certificate of health?

A. I saw Dr. Eagleson, the company's medical examiner, and requested him to examine Mr. Phinney and furnish a certificate of health. He told me that he had examined him recently for the Equitable and that they had refused the policy, and it would be useless to try to pass him for the reinstatement.

Q. You had the renewal receipt at the time in your possession? A. Yes, sir.

Q. Now, you have said that you saw Mr. Phinney a few days before this policy matured, in 1891—the premiums you claim—and had a talk with him about it, and he said he was anxious for you to take his notes, and you informed him that you could not take his notes?

A. Yes, sir.

Q. When was the next time you saw him?

A. Well, I saw him so often that I could not fix any particular date within a few days.

Q. What did you tell him the next time you saw him?

A. In reply to his answer I told him—

Q. What was the conversation between you and Mr. Phinney the first time you saw him after the premium was due?

A. It was to this effect, that he asked me to take his notes in lieu of cash, and deliver him the company's receipt.

Q. What did you say?

A. I told him that I could not accept his notes, as I had to pay cash to the company and didn't have it.

Q. You told him that it would be necessary to get cash? A. Yes, sir.

Q. Before you delivered the receipts?

A. Yes, sir.

Q. When was the next time you saw him?

A. Within a week or ten days, I should think.

Q. What was the conversation then? A. It was about to the same effect as the first.

Q. Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in a general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. Now, just going back, you say finally he told you he was ready to pay the premium? A. Yes, sir.

Q. What did you tell him?

A. I told him that I could not accept the premium without a certificate of health.

Q. That the policy was forfeited?

A. That the policy was forfeited.

Q. Lapsed? A. Lapsed.

Q. And you could not accept it? Now, you wrote to the company that he had tendered the premium, didn't you? A. Yes, sir.

Q. You understood that was a good tender, didn't you? A. Yes, sir.

Defendant moves to strike out the answer of the witness as to what he understood.

Motion sustained.

Q. You understood Phinney was ready to pay—he said so? A. Yes, sir.

Q. You told him you could not accept it because he was in ill health? A. Yes, sir.

Q. And you say later on you went to the office and borrowed this policy? A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect?

A. Words to that effect; yes, sir.

Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours?

A. Yes, sir.

Q. Now, you didn't mean to tell him an untruth?

A. No, sir.

Second.

Plaintiff asks that defendant's proposed exception number two be amended by inserting at the end of said proposed exception the following words, to-wit: The balance of the evidence in having bearing on and relation to this exception is found in exception numbe and number 27.

Third.

Plaintiff asks defendant's proposed exception number three be amended by inserting in said exception at the beginning thereof, as follows, to-wit: A. B. Forbes said, being called as a witness on behalf of defendant to prove its issues, among other things, as follows:

A. I forwarded it to Mr. Stinson.

Q. What became of them, if you know?

A. Mr. Stinson's account came down, and it was unpaid, and not reported as paid, and we wrote up as usual

to have these receipts returned, and he returned that receipt to us with others.

Q. The Phinney receipt was returned?

A. The Phinney receipt was returned.

Q. What is done by the agent with the receipt if the premium is paid?

A. He gives it to the person who pays the premium.

Q. This receipt was returned to you?

A. This receipt was returned to me.

Q. And you returned it to New York?

A. I forwarded it to New York.

Recross-examination.

Q. (By *Mr. Warburton.*) Was the report of this premium being unpaid and the return of this receipt accompanied by a letter?

A. I think all our reports are with a statement that goes to each department.

Q. Have you got that letter here?

A. I have not. It is merely forwarded to us among premium receipts in a printed form and returned.

Q. Have you got the letter returning the premium receipts? A. It was returned with many others.

Defendant's counsel produced letter dated November 26.

Q. I show you this letter.

A. This is the letter from Mr. Stinson.

Q. This is Stinson's signature?

A. This is Stinson's signature.

(Paper marked Plaintiff's Exhibit K for identification.)

Q. What is this paper?

A. This is a communication from F. L. Stinson.

Said F. L. Stinson being called as a witness on its own behalf to prove its issues, on its own behalf, testified on direct examination as follows:

Q. You had the renewal receipt at that time in your possession? A. Yes, sir.

Q. What was done with that?

A. I returned it to Mr. Forbes.

Q. I will ask you whether or not Mr. Phinney at any time presented you the money for this purpose.

A. No, he did not.

On cross examination he testified as follows:

Q. Now, just going back, you say finally he told you he was ready to pay the premium. A. Yes, sir.

Q. What did you tell him?

A. I told him that I could not accept the premium without a certificate of health.

Q. That the policy was forfeited?

A. That the policy was forfeited.

Q. Lapsed? A. Lapsed.

Q. And you could not accept it? Now, you wrote the company that he had tendered the premium, didn't you?

A. Yes, sir.

Plaintiff further asks that said proposed exception number three be further amended by inserting after the word F. L. Stinson, at the bottom of page five of said proposed exception, the following.

Q. I show you plaintiff's Exhibit "L" for identification. A. Yes, sir. That is a letter I received from Mr. Stinson.

Plaintiff offers in evidence plaintiff's Exhibit "L" for identification.

Paper received without objection, and marked plaintiff's Exhibit "L."

EXHIBIT "L."

Seattle, Washington, Dec. 10th, 1891.

A. B. Forbes, Esq., Gen'l Agt.

Dear Sir: Your wire of the 9th inst. reading: "If tendered decline acceptance September premium No. 422198, Phinney," duly received.

This premium was tendered a few weeks ago but was refused by me, as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON.

Across the face appears:

"A. B. Forbes, Dec. 14, 1891, General Agent, S. F." [Indorsed]: "Plaintiff's Exhibit 'L.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did you, on or about the 9th day of December, 1891, on receipt of telegraphic instructions from the company, repeat the same to Mr. Stinson at Seattle, in these words: "If tendered decline acceptance of September premium 422198"?

A. I presume that is the record there, that is so. We repeated the telegram as we received it from New York.

Q. And you state, as I understand you, that you know nothing of any negotiations looking to the rescission or abandonment of the Phinney policy.

A. No, for this reason: we sent the premium receipt to New York as forfeited. It was notice to the company of all that. Their wires covered all the ground, and then the details had to be left with the agent here.

Q. That settled the matter so far as you are concerned?

A. That settled the matter so far as I was concerned. I will say here, it is not an uncommon thing to have people pay the first year's premium, and then come in and want to negotiate for time, or something I cannot give them, and they hand over their policies.

Q. Did you ever have any direct correspondence with Mr. Phinney on the subject of his insurance?

A. Never. I think not, sir. Mr. Stinson was my agent.

Q. All you know of this case then, you derived from reports and correspondence between yourself and Mr. Stinson?

A. Yes, sir, he was my agent and acted as such.

Fourth.

Plaintiff asks that defendant's proposed exception number four be amended as follows: That there be stricken out the following words and lines, to-wit:

"Thereupon, while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instructions, and its exception was allowed by the Court," and in lieu thereof the following be inserted, to-wit: That at the conclusion of the testimony defendant requested the Court in writing to give twenty-seven instructions, so prepared and so numbered by it. That said twenty-seven requests were all the requests for instructions made by defendant. That thereafter the Court charged the jury as in defendant's proposed exception number thirty set forth. That immediately thereafter, and while the jury were still at the

bar, defendant in taking and saving exceptions to the refusal of the Court to give said instructions so requested by it, used the following language only:

"Defendant excepts to the refusal of the Court to give the instructions requested numbered from one to twenty-seven inclusive."

That no other exception was taken to the Court's refusal to give any one or all of defendant's requests.

That said exception by said defendant was not in writing, but was dictated to the stenographer, who reported the proceedings of the trial. That no other or different exceptions to the refusal of the Court to give said, or any, instructions was taken by said defendant at that or any other time, or in any other manner. But the language quoted as having been dictated to the stenographer, to-wit: "Defendant excepted to the refusal of the Court to give the instructions requested, numbered from one to twenty-seven inclusive," was the sole, entire, and exclusive exception taken or noted by said defendant at any time, to the refusal of the Court to give said or any of its requests to charge the jury.

Fifth.

Plaintiff asks that defendant's proposed exception number five be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court, and that there be inserted in

lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Sixth.

Plaintiff asks that defendant's proposed exception number six be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Seventh.

Plaintiff asks that defendant's proposed exception number seven be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Plaintiff further asks that all the language following the above quoted in said exception be stricken out.

Eighth.

Plaintiff asks that defendant's proposed exception number eight be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar,

defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Ninth.

Plaintiff asks that defendant's proposed exception number nine be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Tenth.

Plaintiff asks that defendant's proposed exception number ten be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Eleventh.

Plaintiff asks that defendant's proposed exception number eleven be amended as follows: That there be stricken out of said exception the following words and lines,

to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Twelfth.

Plaintiff asks that defendant's proposed exception number twelve be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Plaintiff further asks that the remainder of said exception immediately following the word "quote" be stricken out.

Thirteenth.

Plaintiff asks that defendant's proposed exception number thirteen be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Fourteenth.

Plaintiff asks that defendant's proposed exception number fourteen be amended as follows: That there be stricken out of said exception the following words and lines, to wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Fifteenth.

Plaintiff asks that defendant's proposed exception number fifteen be amended as follows: That there be stricken out of said exception the following words and lines, to wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Sixteenth.

Plaintiff asks that defendant's proposed exception number sixteen be amended as follows: That there be stricken out of said exception the following words and lines, to wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted

in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Seventeenth.

Plaintiff asks that defendant's proposed exception number seventeen be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Eighteenth.

Plaintiff asks that defendant's proposed exception number eighteen be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Nineteenth.

Plaintiff asks that defendant's proposed exception number nineteen be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was

duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Twentieth.

Plaintiff asks that defendant's proposed exception number twenty be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Plaintiff further asks that said exception number twenty be further amended by inserting at the end of it, immediately after the word "no," the following, to-wit:

Mr. Stinson, on cross-examination, testified as follows:

Q. Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in a general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. And you say later on you went to the office and borrowed this policy?

A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect?

A. Words to that effect, yes, sir.

Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours? A. Yes, sir.

Q. Now, you didn't mean to tell him an untruth?

A. No, sir.

Q. You know now that it was not true, don't you?

A. What?

Q. That the policy was not forfeited, but you thought it was forfeited, but as a matter of fact it was not forfeited at that time?

Defendant objects as calling for a conclusion of law. Objection sustained. Exception allowed.

Q. Well, Phinney permitted you to take the policy?

A. Yes, sir.

Q. Did you ever return it to him? A. Not to my knowledge. I don't remember that I did.

Q. What became of this policy?

A. I don't know.

Q. You haven't got it now? A. No, sir.

Q. You say Phinney let you have this policy for canvassing purposes? A. Yes, sir.

Q. You asked him for it for that purpose?

A. Yes, sir.

Q. Now you would not care to have a dead policy for canvassing purposes, would you?

A. It would not make any difference whether it was dead or alive.

Q. You would not say that Phinney had a policy issued for a hundred thousand and it was such an expensive contract—

A. That is part I should not state if I was canvassing. I should show the contract.

Q. For the purpose of soliciting you would let them understand it was a live policy? A. Yes, sir.

Mr. Pond, witness in behalf of defendant, testified as follows:

"I think the first intimation I had of any claim from Mrs. Phinney, was the coming to my office of some clerk who told me that Mrs. Phinney had telephoned to know about her husband's insurance, and so, as soon as I came in, I looked up the record. That was the first knowledge I had that there was a policy, or had been a policy at all. I found out in the old book that there was a policy for one hundred thousand dollars taken in 1890, and lapsed after the payment of the first premium."

The deposition of Richard A. McCurdy, president of defendant company, was taken, and the same was introduced in evidence, and among the questions and interrogatories propounded to him were the following:

Q. What relation, if any, existed between F. L. Stinson of Seattle, Washington, and the said Mutual Life Insurance Company of New York, between 1890 and 1893?

A. A. B. Forbes was general agent for the Pacific Coast, including the State of Washington. No relation existed between this company and F. L. Stinson.

Q. If in answer to interrogatory four you say that F. L. Stinson, of Seattle, Washington, represented said Mutual Life Insurance Company of New York, as agent, state fully his powers and duties, in every particular. If his agency was created by writing, attach the original writing, or a copy, and properly identify it.

A. Mr. Stinson did not represent the company as its agent.

Q. What negotiations were had, if any, with Guy C.

Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance. State very fully everything said or done by, or on behalf of, the company, looking toward that end.

A. I do not know of any.

Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach a copy of same to this deposition, and properly identify it. A. I know of nothing.

Q. Attach to your deposition every writing, of every kind or description, between the Mutual Life Insurance Company of New York and its agent, or between it and Guy C. Phinney, that in any manner related to, or is connected with, a waiver, abandonment, or rescission of the contract.

A. There are no writings in this office, except in Mr. Forbes' report of the premium unpaid, and the executive direction not to restore, which latter is as follows: Forfeited September 25th, 1891. Do not restore. 2nd Vice-President. 28th March, 1892.

The deposition of H. E. Duncan, corresponding secretary of the said Mutual Life Insurance Company of New York, was taken, and among the interrogatories propounded to him, and his answers thereto, are the following:

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by, or on behalf of, the company

looking toward that end. A. Mr. Forbes had charge of that matter, and it was attended to in the West.

Q. What party, or parties, were employed, or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach copy of same to this deposition and properly identify it. A. Mr. Forbes had charge of this matter, and it was attended to in the West.

Q. Attach to your deposition every writing, of every kind and description, between the Mutual Life Insurance Company of New York, and its agents, or between it and Guy C. Phinney, that in any manner related to, or is connected with, a waiver, abandonment, or rescission of the contract. A. No such writings on file in this office. It was attended to in the West.

Q. If your answer to the preceding interrogatories discloses that the policy appeared on the books of the insurance company as a dead or terminated policy, state whether it was designated as a lapsed or forfeited policy.

A. I produce here a book of the company, and the entries thereon are as follows: Forfeited September 25th, 1891. Do not restore. 2nd Vice-President. 28 March, 1892.

Said A. B. Forbes, general agent of the Pacific Coast for defendant, being called as a witness by plaintiff, testified as follows:

Q. What negotiations were had, if any, with Guy C. Phinney looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully every

thing said and done by or on behalf of the company looking toward that end.

A. That was a matter that I left the detail of it to my agent here. I gave him the principal instructions, and the rest he had to perform.

Q. What instructions did you give him?

A. By telegram.

Q. Any other?

A. Perhaps a letter confirming the telegram.

Q. These documents have been put in evidence in this case?

A. I think so—I don't know whether they have or not.

Q. I will ask you to look at that copy attached to your deposition, Mr. Forbes, and state if that is your signature?

A. That is my signature there; this letter is a copy of the one received from Mr. Stinson.

Q. Please look at the document which I hand you, and state what that is. (Showing witness plaintiff's identification "K.")

A. That is a letter from Mr. Stinson returning the premiums unpaid.

Plaintiff offers in evidence plaintiff's Exhibit "K" for identification.

Objected to by defendant as incompetent and not proper rebuttal.

Objection overruled. Exception allowed.

EXHIBIT "K."

Seattle, Washington, Nov. 26, 1891.

A. B. Forbes, Esq., Gen'l Agt.

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts.

August.

114293	Curtis	No. 393675	Rogers
415957	Cushing	416309	Rice
418420	Calhoun	420062	Benson
441063	Raymore	441073	Patterson

September.

51342	Janney	No. 270465	McKay	
287091	O'Connor	307195	Mohr	
373328	Finch	373530	Heaton	
375371	Buttner	412636	Anderson	
418608	Monroe	422198	Phinney	(Offered to pay but in ill health.
		434207	Behrman	

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipts asked for) will be reported in next acct.

Yours very truly,

F. L. STINSON.

[Endorsed]: "Plaintiff's Exhibit 'K.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. I show you plaintiff's Exhibit "L" for identification.

A. Yes, sir. That is a letter I received from Mr. Stinson.

Plaintiff offers in evidence plaintiff's Exhibit "L" for identification.

Paper received without objection, and marked plaintiff's Exhibit "L."

EXHIBIT "L."

Seattle, Washington, Dec. 10, 1891.

A. B. Forbes, Esq., Gen'l Agt.

Dear Sir: Your wire of the 9th inst. reading, "If tendered decline acceptance September premium No. 422198, Phinney," duly received.

This premium was tendered a few weeks ago, but was refused by me as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON.

Across the face appears:

"A. B. Forbes, Dec. 14, 1891, General Agent, S. F."

[Endorsed]: "Plaintiff's Exhibit 'L.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did you on or about the 9th day of December, 1891, on receipt of telegraphic instructions from the company, repeat the same to Mr. Stinson at Seattle in these words: "If tendered decline acceptance of September premium No. 422198"?

A. I presume that is the record, that is so. We repeated the telegram as we received it from New York.

Q. And you state, as I understand you, that you know nothing of any negotiations looking to the rescission or abandonment of the Phinney policy?

A. No; for this reason: We sent the premium receipt to New York as forfeited. It was notice to the company of all that. Their wires covered all the ground, and then the details had to be left to the agent here.

Q. That settled the matter as far as you are concerned?

A. That settled the matter as far as I was concerned. I will say here, it is not an uncommon thing to have people pay the first year's premium and then come in and want to negotiate for time, or something I cannot give them, and they hand over their policies.

The following exhibits were introduced in evidence, without objection:

EXHIBIT "D."

New York, July 19th, 1894.

Mrs. Nellie Phinney, 1201 James Street, Seattle, Washington.

Madam: Acknowledging receipt of yours of the 12th inst., we beg to advise you that policy 422198 on the life of the late Guy C. Phinney was issued September 24th, 1890, and was forfeited September, 1891, for nonpayment of premium. This policy therefore has no value. If you desire any further information regarding this insurance we respectfully suggest that you should communicate with our general agent, Mr. A. B. Forbes, San Francisco, Cal., through whose agency this policy was issued.

Yours very truly,

H. E. DUNCAN, Jr.,

[Endorsed.] Corresponding Sec.

EXHIBIT "E."

Seattle, Wash., July 24th, 1891.

Mrs. Guy C. Phinney, City.

Dear Madam: We beg to advise you that but one annual premium was paid under your husband's policy 422198 for $100,000, and therefore the policy lapsed Sept.

1891. Our senior, Mr. Pond, is in Portland, and upon his return will probably take the first opportunity to call upon you and explain this information in detail.

Yours very truly,

WM. S. POND, Manager.

[Endorsed.] Per Geo. R. Carter.

That after the commencement of this action, and after defendant had appeared and demurred, defendant by its attorney demanded that plaintiff produce this said policy that it might inspect the same.

That immediately prior to the trial of said cause, plaintiff sued out a commission for the taking of the depositions of H. E. Duncan, Richard McCurdy, and W. J. Easton, all officers of defendant corporation, also for the taking of the depositions of A. B. Forbes and Stanley Forbes. Said A. B. Forbes, from September 24th, 1890, to the commencement of the suit was general manager of said defendant company for the Pacific Coast, including Washington, and Stanley Forbes during all of said time being his cashier. That thereupon said plaintiff filed her interrogatories to be propounded to each of said witnesses, and served a copy thereof on defendant's attorneys. That among the interrogatories to be propounded to said Richard A. McCurdy, also said W. J. Easton, also to said H. E. Duncan, also to said A. B. Forbes, and also to said Stanley Forbes, were among others the following interrogatories:

"Q. State fully what form of premium notices was used, if any, by the Mutual Life Insurance Company of New York, to notify the parties insured in said company, that premiums would become due on policies issued

through Pacific Coast agencies on parties residing in the State of Washington, during the year 1890, 1891, 1892, and 1893. If more than one form was used state fully what each contained.

"Q. Attach to this deposition copies of each and every form of notices used as described in the preceding interrogatory, during the time therein mentioned."

That thereafter defendant's attorneys filed written exceptions thereto, on the ground that the same were incompetent, irrelevant, and immaterial.

That thereafter plaintiff and defendant each appeared before the Hon. C. H. Hanford, Judge of said Court, for the purpose of settling said interrogatories, and defendant insisted upon each of said objections and exception to said interrogatories.

That thereupon plaintiff, by her attorneys, stated that she desired and insisted that said interrogatories should be answered. That she might need them for the purpose of rebuttal in case defendant should claim that it had sent or mailed any notice to Guy C. Phinney or claim any benefit of any notice claimed to have been sent to said Phinney. That the answers of said witnesses together with other evidence that plaintiff would have at hand, would enable plaintiff to prove that the notice required by the statute of New York had never been mailed to said Phinney. That plaintiff desired to prove the custom of said defendant as to the mailing of notices to its policy holders, under any and all circumstances. That such evidence would disclose the fact that no notice was mailed at all to Guy C. Phinney. Whereupon said defendant by its attorneys then stated and declared to plaintiff and said

Court that said defendant was not claiming to have mailed any notice to said Phinney. That it had not alleged in its answer that it had mailed any notice to said Phinney, and was not claiming and would not claim any benefit from the mailing or sending any notice to said Phinney. Whereupon relying upon the statements of said counsel, said Court sustained defendant's objection and exceptions to said interrogatories and denied to plaintiff the right of having said interrogatories answered.

Twenty-first.

Plaintiff asks that defendant's proposed exception number twenty-one be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception; that there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested instruction are set forth in exception number twenty as amended.

Twenty-second.

Plaintiff asks that defendant's proposed exception number twenty-two be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the

bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception. That there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested instruction are set forth in exception number twenty as amended.

Twenty-third.

Plaintiff asks that defendant's proposed exception number twenty-three be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: Thereupon, while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court, and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

That there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested instruction are set forth in exception number twenty as amended.

That there also be inserted the following, to-wit: On redirect examination Nellie Phinney testified as follows:

Q. (By *Mr. Warburton.*) You say that Mr. Phinney never told you this policy was forfeited? A. No.

Q. Did he ever tell you it was alive? A. Yes.

Q. How many times did he tell you it was alive?

A. I could not tell you just how many times, but a number of times.

Q. How long prior to his death did he mention this policy as being one of his policies of insurance that was in force? A. Not more than two weeks.

Q. Did he give you any directions as to the use of the insurance you should collect. A. Yes, sir.

Q. Mention this policy among them?

A. Yes, sir.

Q. You say you did have several conversations with Mr. Burleigh about this?

A. Well, I don't know several—I know I have talked with Mr. Burleigh.

Q. Did you talk to others about it? A. No.

Q. State the condition of your health, Mrs. Phinney, immediately after the death of your husband.

Objected to by counsel for defendant as immaterial.

Objection overruled; exception allowed.

Q. For the first nine months after Mr. Phinney's death.

A. The first year after Mr. Phinney's death I was seriously ill.

Q. Were you able to attend to business at all during that time? A. No, I was not.

Q. These policies were collected by your agent, were they not? A. Yes, sir.

Q. The business matters were all turned over to other parties? A. All done through other parties.

Q. Who prepared that letter, Mrs. Phinney, that you mailed to New York?

A. Objected to by counsel for defendant as immaterial.

Twenty-fourth.

Plaintiff asks that defendant's proposed exception number twenty-four be amended as follows: That there be stricken out of said exception the following words and lines, to-wit:

"Thereupon while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception number four. That there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested exception are set forth in exception number twenty as amended.

Twenty-fifth.

Plaintiff asks that defendant's proposed exception number twenty-five be amended as follows: That there be stricken out of said exception the following words and lines, to-wit:

"Thereupon, while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception. That there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested in-

struction are set forth in exception number twenty amended.

Twenty-sixth.

Plaintiff asks that defendant's proposed exception number twenty-six be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception; that there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested instruction are set forth in exception number twenty as amended.

Twenty-seventh.

Plaintiff asks that defendant's proposed exception number twenty-seven be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was allowed by the Court," and in lieu thereof the following be inserted, to-wit: That at the conclusion of the testimony defendant requested the Court in writing to give twenty-seven instructions, so prepared and so numbered by it; that said twenty-seven requests were all the requests for instructions made by defendant; that thereafter the Court charged the jury as in defendant's proposed exception number thirty set forth; that immedi-

ately thereafter, and while the jury were still at the bar, defendant, in taking and saving exception to the refusal of the Court to give said instruction so requested by it, used the following language only:

"Defendant excepts to the refusal of the Court to give the instructions requested, numbered from one to twenty-seven inclusive."

That no other exception was taken to the Court's refusal to give any one or all of defendant's requests.

That said exception by said defendant was not in writing, but was directed to the stenographer, who reported the proceedings of the trial. That no other or different exception to the refusal of the Court to give said or any instructions was taken by said defendant at that or any other time, or in any other manner. But the language quoted as having been dictated to the stenographer, to-wit: "Defendant excepted to the refusal of the Court to give the instructions requested numbered from one to twenty-seven inclusive," was the sole, entire, and exclusive exception taken or noted by said defendant, at any time, to the refusal of the Court to give said or any of its requests to charge the jury.

Twenty-eighth.

Plaintiff asks that defendant's proposed exception number twenty-eight be amended as follows: That there be stricken out of said exception the following words and lines, to-wit:

"To which in said instruction of the Court, subsequent to the conclusion of its charge, and while the jury was still at the bar, defendant duly excepted in writing and

exception was duly allowed by the Court," and in lieu thereof the following be inserted, to-wit. That at the conclusion of the instructions of the Court to the jury, plaintiff excepted orally to the charge of the Court, and the same was noted by the stenographer. That the instructions of the Court are set forth in full in exception number thirty. That the defendant thereupon orally excepted to the charge of the Court as follows, to-wit:

The defendant excepts to the instructions of the Court to the jury wherein the Court stated the effect of the statute of the State of New York upon the policy sued upon in this action, which said instruction began with the words, in substance as follows: "The law of this contract is controlled by the statute of New York" and down to that portion of the Court's charge beginning "several defenses," that a strict compliance with that statute was necessary and in substance that it could not be waived. That will identify the instructions so that it can be covered. And to the whole of the instruction covering the application of the New York statute, and the rule which would apply to the policy under that statute and the effect of that statute.

We desire further to except to that portion of your Honor's charge wherein you stated that if this agreement for the abandonment or surrender Mr. Phinney's policy was entered into between the company's representatives and Mr. Phinney uninfluenced or without any false representations or deceit practiced upon said Phinney, that the contract would be put to an end, upon the ground that there is no evidence. We desire to except to that portion of the instruction which refers to false representations or

deceit on the ground that there is no evidence of any false representations or deceit.

Also that portion of your Honor's charge in which you stated in order to constitute abandonment of a contract there must be a mutual agreement.

Also to that portion of your Honor's charge wherein you state that in order to render this abandonment of the contract claimed by the defendant effectual that the jury must find that the company, relying upon that, acted.

The Court.—Exceptions allowed.

That no other or different exception or exceptions were made to the Court's charge to the jury, or any part thereof, than as above set forth.

Twenty-ninth.

Plaintiff asks that defendant's proposed exception number twenty-nine be amended as follows, to-wit: That there be stricken out of said proposed exception the following words and language, to-wit: "To which said instruction the Court subsequent to the conclusion of its charge, and while the jury was still at the bar, defendant duly excepted in writing," on the ground that there was no evidence showing or tending to show any fraud, false representations, or deceit, and that there be inserted in lieu thereof the words and lines requested to be inserted in exception number twenty-eight.

Plaintiff also asks that the words "and nothing in the pleadings upon which such evidence could be introduced" be stricken out, as no such exception was taken.

Plaintiff further asks that the following words be

stricken out: "All the evidence in this cause relating to a rescission of the contract, and surrender of the policy by the assured was as is stated in the twentieth and twenty-third exception herein, and that there be inserted in lieu thereof the following:

F. L. Stinson being duly sworn, testified, among other things, as follows:

Q. Now, in the case of Mr. Phinney, was such notice sent by you, that is, before the second years' premium matured?

A. I presume it was. I sent them to all the policy holders.

Q. What did Phinney do in response to that notice, if anything?

A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company, and asked me if I could not take his notes for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company, and they would take only cash. I think a few days before it was due, perhaps three or four days, I met him again and we had a similar conversation and I told him about the same again, that I was unable to carry his notes; that I did not have the cash to put up to the company.

Q. Did he ever make payment of that premium to you? A. Not to me; no, sir.

Q. Who else in this State was authorized to receive and collect premiums? A. *No, Sir.*

Q. How did the time limited for the payment of premium—that expired without the payment of the premium I understand?

Objected to by plaintiff's counsel as calling for a conclusion.

The Court.—That is an unimportant question.

Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due, and was unpaid, with reference to this particular premium?

A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten days I should say—between one and two weeks after it was due, he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it and he then told me that he was prepared to pay the premium.

Q. What did he ask you to do?

Objected to as leading by plaintiff's counsel.

Q. What, if anything, did he ask you to do?

Objection overruled. Exception allowed.

A. He told me if I would bring the renewal receipt, or words to that effect, that he would pay the premium.

Q. State what occurred between you, what you said to him, and what he said to you.

A. I told him that I could not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank—I am not positive about that. He told me that he did not think that he could pass for a certificate of health, from the fact that he had been rejected by the Equitable a few days before.

Q. Now, were any steps taken by you or by Mr. Phinney, to your knowledge, to ascertain whether or not he could obtain a certificate of health?

A. I saw Dr. Eagleson, the company's medical exami-

ner, and requested him to examine Mr. Phinney and furnish a certificate of health. He told me that he had examined him recently for the Equitable, and that they had refused the policy, and it would be useless to try to pass him for the reinstatement.

Q. You had the renewal receipt at the time in your possession? A. Yes, sir.

Q. Now, you have said that you saw Mr. Phinney a few days before this policy matured, in 1891—the premiums you claim—and had a talk with him about it, and he said he was anxious for you to take his notes, and you informed him that you could not take his notes?

A. Yes, sir.

Q. When was the next time you saw him?

A. Well, I saw him so often that I could not fix any particular date, within a few days.

Q. What did you tell him the next time you saw him?

A. In reply to his answer I told him—

Q. What was the conversation between you and Mr. Phinney the first time you saw him after the premium was due?

A. It was to this effect, that he asked me to take his notes in lieu of cash, and deliver him the company's receipt.

Q. What did you say?

A. I told him that I could not accept his notes, as I had to pay cash to the company, and I didn't have it.

Q. You told him that it would be necessary to get cash? A. Yes, sir.

Q. Before you delivered the receipts?

A. Yes, sir.

Q. When was the next time you saw him?

A. Within a week or ten days, I should think.

Q. What was the conversation then?

A. It was about to the same effect as the first.

Mr. Stinson on cross-examination testified as follows:

Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in a general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. And you say later on you went to the office and borrowed this policy? A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect?

A. Words to that effect; yes, sir.

Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours? A. Yes, sir.

Q. Now you didn't mean to tell him an untruth?

A. No, sir.

Q. You know now that it was not true, don't you?

A. What?

Q. That the policy was not forfeited, but you thought it was forfeited, but as a matter of fact it was not forfeited at that time?

Defendant objects as calling for a conclusion of law.

Objection sustained. Exception allowed.

Q. Well, Phinney permitted you to take the policy?

A. Yes, sir.

Q. Did you ever return it to him?

A. Not to my knowledge. I don't remember that I did.

Q. What became of this policy?

A. I don't know.

Q. You haven't got it now? A. No, sir.

Q. You say Phinney let you have this policy for canvassing purposes? A. Yes, sir.

Q. You asked him for it for that purpose?

A. Yes, sir.

Q. Now, you would not care to have a dead policy for canvassing purposes, would you?

A. It would not make any difference whether it was dead or alive.

Q. You would not want to say that Phinney had a policy issued for one hundred thousand, and it was such an expensive contract—

A. That is part I should not state if I was canvassing. I should show the contract.

Q. For the purpose of soliciting you would let them understand it was a live policy? A. Yes, sir.

That the following exhibits were introduced in evidence.

EXHIBIT "K."

Seattle, Washington, Nov. 26th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

114293 Curtis	No. 393675 Rogers
415957 Cushing	416309 Rice
418420 Calhoun	420062 Benson
441063 Raymore	441073 Patterson

September.

51342	Janney	No. 270465	McKay
287091	O'Connor	307195	Mohr
373928	Finch	387530	Heaton
375371	Buttner	412636	Anderson
413608	Monroe	422198	Phinney Offered to pay but in ill-health.

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipts asked for will be reported in next account.)

Yours very truly,

F. L. STINSON."

EXHIBIT "L."

Seattle, Washington, Dec. 10th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: Your wire of the 9th inst. reading, "If tendered, decline acceptance September premium, No. 422198, Phinney," duly received.

This premium was tendered a few weeks ago, but was refused by me as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON.

Across the back appears:

"A. B. Forbes, Dec. 14, 1891, General Agent, S. F."

The deposition of W. J. Easton, secretary of the company, was introduced in evidence, and among others the following interrogatories and answers thereof were read in evidence:

After premium was unpaid, Mr. Stark made these reports to Mr. Forbes:

No. 422198. Amount $100,000.

Name GUY C. PHINNEY.
Residence, Seattle, Washington.
Business, Pres. City National Bank.
Date of Investigation, Jan. 22, 1892.

Remarks.

Financially all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

[Signed] STARK.

No. 422198. Amount $100,000.

Name GUY C. PHINNEY.

Residence, Seattle, Washington.

Business, Pres. City National Bank.

Date of investigation. Forfeited.

Remarks.

All right fin. but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

[Signed] STARK.

Awaiting particulars.

Q. In what manner did the policy of Guy C. Phinney, number 422198 appear on the books of the company on the 12th day of September, 1893, as to whether it was a live, dead, or terminated policy?

A. This book of the company which I produce here has in it the following entries: Forfeited September 25th, 1891. Do not restore. 2nd Vice-President. 28th March, 1892.

That the balance of the evidence relating to the rescission of the contract and surrender of the policy as claimed by defendant was, as is stated, in the twentieth and twenty-third exception, together with plaintiff's proposed amendments thereto, and also exception number twenty-seven.

Thirty.

Plaintiff asks that defendant's proposed exception number thirty be amended as follows: "To which said instruction was given at the conclusion of the trial, and while the jury were still at the bar, defendant duly excepted in writing, and its exception was allowed by the Court." That the foregoing be stricken out of said exception, and that there be inserted in lieu thereof the words and language plaintiff asks be inserted in exception twenty-eight. That the followingalso be strickenout, to-wit: "All the evidence in this cause relating to obtaining a rescission of the contract, and the alleged surrender of the policy, by defendant, was as is stated in the twentieth and twenty-third exception, together with plaintiff's amendment thereto, and also in the twenty-seventh exception.

Thirty-first.

Plaintiff asks that defendant's proposed exception number thirty-one be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, and while the jury was still at the bar, defendant duly excepted in writing to the instruction given by the Court as embodied in said question, and its exception was duly allowed by the Court," and that

there be inserted in lieu thereof the following: The above answer was one of four answers to four questions asked by the jury, the questions and answers being set forth in defendant's exceptions number thirty-one, thirty-two, thirty-three, and thirty-four. That at the conclusion of the Court's answers to said questions the defendant orally interposed the following objection:

Defendant excepts to the additional instruction given by the Court to the jury, and to each of them, and requests that the instruction just given be modified. Whereupon the Court said:

"Your exception is allowed, and it is necessary to have a bill of exceptions show that these questions were received and answered by the Court and exceptions allowed to each one of them, and also that you asked to have a modification of instructions, by substantial repetition of the instructions which the Court gave in regard to the abrogation of the contract by agreement between Stinson and Phinney. Your request for the modification refused and exception allowed."

Thirty-second.

Plaintiff asks that defendant's proposed exception number thirty-two be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, and while the jury was still at the bar, defendant duly excepted to the instruction of the Court to the jury, embodied in said question and answer, and its exception was duly allowed by the Court," and plaintiff asks that there be inserted in lieu thereof the

same words and matters that plaintiff asks be inserted in exception thirty.

Thirty-third.

Plaintiff asks that defendant's proposed exception number thirty-three be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted to the instruction of the Court to the jury, embodied in said question and answer, and its exception was duly allowed by the Court," and plaintiff asks that there be inserted in lieu thereof the same words and maters that plaintiff asks be inserted in exception number thirty.

Thirty-fourth.

Plaintiff asks that defendant's proposed exception number thirty-four be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted to the instruction of the Court to the jury embodied in said question and answer, and its exception was duly allowed by the Court," and plaintiff asks that there be inserted in lieu thereof the same words and matters that plaintiff asks be inserted in exception number thirty.

Plaintiff asks that defendant's proposed Bill of Exceptions be amended as follows: That imediately following defendant's proposed exception number thirty-four, there be inserted and added to said proposed Bill of Exceptions the following, to-wit:

"After the conclusion of the evidence and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instructions, to-wit:

Instruction requested by defendant number twenty-four.

"You are instructed that the written appointment of F. L. Stinson made by the defendant, on the 16th day of April, 1891, and filed in the office of the secretary of state of the State of Washington, pursuant to the statute of the State of Washington a certified copy of such appointment has been introduced, must be accepted by you as sufficient proof that the said Fred L. Stinson was, at the date of said written appointment, the general agent of the State of Washington for the defendant, which agency would be presumed to continue until some sufficient revocation of the powers conferred by said written appointment were shown; and there is no evidence of the revocation of said powers, prior to the death of Guy C. Phinney."

Instruction requested by the defendant number twenty-six.

"If you believe from the evidence in this case that Guy C. Phinney, the assured, treated and negotiated with F. L. Stinson as the agent of the company as one having full authority concerning the matter then in hand between said Phinney and said company you are instructed that the plaintiff executrix would have no right as against the principal of said Stinson, the defendant here, to dispute or

deny the authority of said agent and would be estopped to deny the claim."

Instruction requested by the defendant, number twenty-seven.

"If the jury believe from the evidence that A. B. Forbes of San Francisco was the general agent and agent of defendant for the Pacific Coast, including Washington, with authority from defendant to appoint State agents, then you are instructed that if the said Forbes appointed said Stinson pursuant to his (Forbes') authority, from the company, State agent for Washington of defendant, such appointment by said Forbes would constitute said Stinson agent for defendant."

That said proposed instructions were three out of twenty-seven proposed by the defendant, and the exception thereto, together with the balance of the twenty-seven requested instructions by the defendant, was excepted to in the same language as set forth in defendant's proposed exception number four as amended by plaintiff.

And now, in furtherance of justice, and that right may be done, the plaintiff presents the foregoing objections and amendments to defendant's proposed Bill of Exceptions, and prays that the said objections and said amendments may be allowed, and the same be inserted within defendant's proposed Bill of Exceptions.

A. F. BURLEIGH,
Attorney for Plaintiff.
STANTON WARBURTON,
Attorney for Plaintiff.

Service of the above and foregoing objections and proposed amendments to defendant's Bill of Exceptions and receipt of copy thereof, on this 28th day of September, 1895, is hereby admitted.

STRATTON, LEWIS & GILMAN,
STRUDWICK & PETERS,
Attorneys for Defendant.

Filed Sept. 28, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the last Will and Testament of GUY C. PHINNEY, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
No. 418.

Bill of Exceptions as Settled and Allowed.

Be it remembered that this cause came on duly and regularly for trial the 25th day of July, 1895, before the Honorable C. H. Hanford, judge of the above-entitled Court; the plaintiff appearing by her attorneys, S. Warburton, Esq., Murry & Christian, and A. F. Burleigh, Esq., and the defendant appearing by its attorney, E. Lyman Short, Esq., Messrs. Strudwick & Peters, and Messrs. Stratton, Lewis & Gilman. A jury having been duly em-

paneled and sworn to try the cause, the following proceedings were had, and the following exceptions duly taken:

First Exception.

F. L. Stinson was called by the defendant to sustain the issues in its behalf, and after being first duly sworn, among other things, testified in substance as follows:

"In the year 1891 I was the general agent of the defendant for the State of Washington. From four to six weeks after the 24th day of September, 1891, Mr. Phinney came to me, and told me he was prepared to pay the premium on the policy for 1891, and if I would bring him a renewal receipt he would pay the premium. I told him that I could not accept the premium at that time unless he furnished a certificate of health, and I think I furnished him the blank. He told me that he did not think he could pass for a certificate of health from the fact that he had been rejected by the Equitable a few days before. I saw Dr. Eagleson, the company's medical examiner, and requested him to examine Mr. Phinney, and furnish a certificate of health. He told me that he had examined him recently for the Equitable, and that they had refused the policy, and it would be useless to try to pass him for the reinstatement. I communicated to Mr. Phinney the result of my visit and application to Dr. Eagleson for a certificate of health."

Dr. J. B. Eagleson was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

"I am a physician and surgeon practicing at Seattle. In September, October, November, and December, 1891, I

was the medical examiner of the Mutual Life Insurance Company of New York, and also of the Equitable Life Insurance Company. I recollect examining Guy C. Phinney for insurance in the Equitable Life in September, 1891—I think it was September 30th."

Q. What, if any, application subsequent to that date was made to you for a certificate of health on the part of Guy C. Phinney for the Mutual Life?

Objected to by plaintiff unless it be shown that application was made by Phinney.

Counsel for defendant states that he wishes to show that the result was communicated to Phinney.

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial.

Said objection was sustained by the Court. Thereupon defendant duly excepted in writing and his exception was duly allowed by the Court.

Q. I will ask this question, stating to the Court that Mr. Stinson testified without objection that he went to Dr. Eagleson for a certificate of health for Mr. Phinney. How long after the 30th of September, when the examination was made for the Equitable Life, was it that Mr. Stinson came to you asking for a certificate of health for Phinney?

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial.

Said objection was sustained by the Court. Thereupon defendant, by its counsel, duly excepted in writing, and its exception was duly allowed by the Court.

Q. I will ask you whether or not about the middle of November, 1891, Mr. Stinson made an application to you

as medical examiner of the Mutual Life Insurance Company, the defendant in this action, for a certificate of health for Guy C. Phinney?

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial.

Said objection was sustained by the Court. Thereupon defendant, by its counsel, duly excepted in writing, and its exception was allowed by the Court.

Second Exception.

It was established by the evidence in this case that A. B. Forbes of San Francisco, California, was, during the years 1890, 1891 and 1892, the general agent for the defendant for the Pacific Coast States and Territories, including the State of Washington. That F. L. Stinson was, during said period, the agent of said defendant for the State of Washington and Oregon, having general charge and management for its business in said States.

Said A. B. Forbes was called as a witness in rebuttal in behalf of the plaintiff, and, having been duly sworn, testified as follows:

Q. I want to ask you two or three questions in reference to this case. First, I want to inquire if you were instructed or notified by the Mutual Life Insurance Company of New York not to accept the second premium on the Phinney policy, number 422198, after September 24, 1891?

Said question was objected to by defendant as incompetent, irrelevant, and immaterial, and not proper rebuttal.

Said objection was overruled by the Court, whereupon defendant, by its counsel duly excepted in writing, and its exception was duly allowed by the Court.

A. I was.

Q. Did you give like notice and instructions to F. L. Stinson, or forward to him any such instructions and notice given by the company with reference to the Guy C. Phinney policy?

Said question was objected to by the defendant as incompetent, irrelevant, and immaterial, and not proper rebuttal.

Said objection was overruled by the Court, whereupon defendant, by its counsel duly accepted in writing, and said exception was duly allowed by the Court.

A. I did.

Third Exception.

The said A. B. Forbes, upon further examination, testified as follows:

Q. Please look at the document which I hand you, and state what it is.

(Showing witness plaintiff's Exhibit "K" for identification.)

A. That is a letter from Mr. Stinson reporting premiums unpaid.

(Plaintiff here offers in evidence plaintiff's Exhibit "K" for identification.)

Objected to by defendant as incompetent, irrelevant, and immaterial, and not proper rebuttal.

Said objection was overruled by the Court, whereupon defendant duly excepted in writing, and his exception

was allowed by the Court, and said Exhibit "K" was received in evidence and was as follows:

'EXHIBIT 'K.'

Seattle, Washington, Nov. 26th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

No. 114293	Curtis	No. 393675	Rogers
415957	Cushing	416309	Rice
418420	Calhoun	420062	Benson
441063	Raymore	441073	Patterson

September.

51342	Janney	270465	McKay
287091	O'Connor	307195	Mohr
373328	Finch	373530	Heaton
375371	Buttner	412636	Anderson
418608	Monroe	422198	Phinney (Offered to pay but in ill-health.
		434207	Behrman

Several of the above, also quite a number of those previously sent will be reinstated. Those not included (if receipts asked for will be reported in next acct.)

Yours very truly,

F. L. STINSON."

Fourth Exception.

Upon the conclusion of the testimony and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instructions to the jury:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof, that a premium of thirty-seven hundred and seventy ($3,770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney died on September 12th, 1893; the evidence in this cause establishes the fact that the assured, Guy C. Phinney did not pay to the defendant, at the time mentioned in said contract, the premium falling due on September 24, 1891, and by reason of said nonpayment of premium by said assured, the said policy became and was void and of no effect after said date; and you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give. Thereupon, while the jury was still at the bar, the defendant duly excepted in writing, to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

It was established by positive, certain, and direct evidence in the case that Guy C. Phinney, did not pay any more than the first premium on the policy in suit, and there was nothing in the case to rebut that positive evidence of sufficient weight to justify the question of pay-

ment of the premiums of 1891 and 1892 being submitted to the jury.

Fifth Exception.

Upon the conclusion of the testimony and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instructions to the jury:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy ($3,770) dollars should be paid to Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of said contract until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated, was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney died on September 12th, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney did not pay to the defendant, at the time mentioned in said contract, the premium falling due on September 24th, 1892, and by reason of said nonpayment of premium by said assured, the said policy became of no effect after said date; and you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give. Thereupon, while the jury was still at the bar, the defend-

ant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

It was established by positive, certain, and direct evidence in the case that Guy C. Phinney did not pay any more than the first premium on the policy in suit, and there was nothing in the case to rebut that positive evidence, of sufficient weight to justify the question of payment of the premiums of 1891 and 1892 being submitted to the jury.

Seventh Exception.

Upon the conclusion of the testimony and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof, that a premium of thirty-seven hundred and seventy ($3,770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of this contract, until premium for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated, was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney died on September 12, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney, did not pay, nor

tender to defendant, at the time stipulated in said contract, the premium falling due on September 24, 1892, and by reason of said nonpayment or tender of premium by said assured, the said policy became and was void and of no effect after said date; and you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give. Thereupon, while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

It was established by positive, certain, and direct evidence in the case that said Guy C. Phinney did not pay any premiums other than his first premium upon said policy, and that he did not tender any subsequent premium at or prior to date the same fell due, and there was nothing to rebut such positive evidence of sufficient weight to justify the question of payment or order at or before the time said premium became due being submitted to the jury.

Eighth Exception.

After the conclusion of the evidence and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof, that a premium of thirty-seven hundred and

seventy ($3,770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893; if you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract, the premium falling due September 24, 1891, such nonpayment by the said assured, would render the said policy void and of no effect after said date. And if you find the facts so to be, you will find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

The evidence relating to the nonpayment of premiums by the assured was as is stated in the fourth exception.

Ninth Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the

Court in writing to give the following instruction to the jury.

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy ($3,770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in the contract the premium falling due September 24, 1892, you are instructed that said nonpayment by the said assured would render the said policy void and of no effect after said date. And if you find the facts so to be, you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and defendant's exception was duly allowed by the Court.

The evidence of nonpayment of premium by the assured was as is stated in the fourth exception.

Tenth Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that it appears from the face of said policy that it contained the following clause as one of the provisions and requirements and conditions thereof: 'Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived.'

"And you are instructed that said waiver by the assured, Guy C. Phinney, of the sending of any notice required by any statute was effectual and binding upon said assured, and is effectual and binding upon the plaintiff in this action; and that by reason of said waiver it was not incumbent upon the defendant, in order to declare or claim a forfeiture of said policy by reason of the nonpayment of premiums according to the terms of said policy, to send to the assured the notice mentioned and required by the laws of the State of New York for the year 1875. Chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321, which is relied upon by the plaintiff even if said statute were otherwise applicable to this contract.

"And you are further instructed, by reason of said waiver, the failure to send statutory notice did not oper-

ate to prevent the forfeiture of said policy pursuant to its terms, by reason of the nonpayment of premiums falling due thereon, and if you find from the evidence that Guy C. Phinney, the assured, did not pay the defendant the premium falling due upon said policy according to its terms September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find he did not pay the premium falling due thereon September 24, 1892."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and defendant's exception was duly allowed by the Court.

There was positive, certain, and direct testimony that the premiums falling due September 24th, 1891, and September 24th, 1892, on the policy in suit were not paid, and no evidence to the contrary.

Eleventh Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that it appears from the application, policy, and pleadings in this action that Guy C. Phinney, the assured, was a resident of the State of Washington, and at all times therein mentioned, and that the application for said policy was signed by said Guy C. Phinney in said State; that said policy, with the applica-

tion, which constituted a part thereof, completely set forth the contract between defendant and the assured.

"You are further instructed that said application provides that said policy 'shall not take effect until the first premium shall have been paid, and the policy shall have been delivered.'

"You are further instructed that it appears from said pleadings that the first premium upon said policy was paid in Seattle, Washington, and that said policy was, by defendant, delivered to assured at the same place.

"You are therefore further instructed that the policy sued upon in this action never became a completed contract, binding upon either party to it, until the delivery of the policy and the payment of the first premium in the State of Washington; and that said policy is, therefore, a Washington contract, and is governed by the laws of the State of Washington, and not by the laws of the State of New York. And that the law of New York, hereinbefore referred to, and relied upon by the plaintiff, is not applicable to and does not govern this contract. And if you find from the evidence that Guy C. Phinney, the assured, did not pay the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find he did not pay the premium falling due thereon September 24, 1892."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give

said instruction, and defendant's exception was duly allowed by the Court.

There was positive, certain, and direct testimony that the premiums falling due September 24th, 1891, and September 24th, 1892, on the policy in suit were not paid, and no evidence to the contrary.

Twelfth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death on September 12th, 1893.

"And you are further instructed that the plaintiff, executrix, was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court. There was positive, direct,

and certain testimony that the premiums on the policies in suit maturing September 24, 1891, and September 24, 1892, were not paid, and there was nothing to rebut that positive evidence of sufficient weight to justify the question of the payment of said premiums being submitted to the jury. There was no evidence introduced of any payment or tender of said premium, or either of them, by plaintiff to the defendant prior to the beginning of this action.

Thirteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death on September 12, 1893.

"And you are further instructed that the plaintiff, executrix, was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant."

The evidence as to payment and tender of said premiums was as is stated in the twelfth exception.

Fourteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"If you find from the evidence in this case that the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death on September 12th, 1893, then you are instructed that the plaintiff executrix is not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past due premium. If you find from the evidence that said premium was still unpaid, and that the amount thereof had never been tendered by the plaintiff to the defendant prior to the beginning of this action, your verdict should be for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

The evidence as to payment and tender of said premium was as is stated in the twelfth exception.

Fifteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to

the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"If you find from the evidence in this case that the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death on September 12, 1893, then you are instructed that the plaintiff, executrix, was not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past due premium. If you find from the evidence that said premium was still unpaid, and the amount thereof has never been tendered by the plaintiff to the defendant, prior to the beginning of this action, your verdict should be for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court. The evidence as to payment and tender of said premium was as is stated in the twelfth exception.

Sixteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that no waiver of the payment of the due premium or of its tender can avail the plaintiff,

unless such waiver, with all the facts alleged to constitute the same, are alleged in the complaint of the plaintiff or in her reply, and there being no such facts pleaded, no evidence on such points can be considered by you, notwithstanding the statute of New York of 1876 and 1877, relied upon by the plaintiff, and there being no testimony of such fact, you are instructed to find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court. The evidence as to payment and tender of said premium was as is stated in the twelfth exception.

Seventeenth Exception

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"The plaintiff in her complaint in this action alleges performance of the conditions of the policy sued on on her part and on the part of Guy C. Phinney. I charge you that under said contract one of the conditions to be performed by the said Guy C. Phinney was the payment of the premiums falling due on September 24, 1891, and September 24, 1892 ;and the plaintiff cannot recover in this action without establishing the allegations of her complaint, performance under such contract, namely, the pay-

ment of said premiums, and if you find from the evidence in this action that the premium of 1891 or the premium of 1892 was not paid by Guy C. Phinney, then your verdict must be for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at thebar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

There was positive, certain, and direct evidence that the premiums of 1891 and 1892 on the policy in suit were not paid, and no evidence to rebut this positive, certain, and direct evidence.

Eighteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that the said statute of New York for 1876 and 1877 is local in its nature, and applies only to assured or their assigns residing in the State of New York; and that the said statute has no application to and does not govern the contract sued upon in this action; and if you further find from the evidence that the assured, Guy C. Phinney, failed to pay either the premium maturing September 24, 1891, or the premium maturing September 24, 1892, then you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give, where-

upon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give the Court.

said instruction, and said exception was duly allowed.

There was positive, certain, and direct evidence that the premiums of 1891 and 1892 on the policy in suit were not paid, and no evidence to rebut this positive, certain, and direct evidence.

Nineteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are further instructed that said law of New York, hereinbefore referred to, and which is relied upon by plaintiff, in so far as it is attempted to be construed to impose the duty of sending notices to residents outside the State of New York, in connection with policies which became completed contracts, either within or without the State of New York, and in so far as it may be construed not to permit any waiver of sending such notices by contract between the parties thereto, is invalid, for the reason that it is violative of and repugnant to the constitution of the United States, because said statute, so construed, would be a denial to this defendant by the State ofNew York and Washington of the equal protection of their laws, and would be a deprivation by said States of the property of defendant without due process of law, and would be a regulation of commerce in the several States,

and would be interfering with the sovereignty of the State of Washington, and would affect property and business without the jurisdiction of the State of New York; and because said law, so construed, violates the Constitution of the United States, in that it is a law impairing the obligation of contracts, and, under the rights, titles and privileges, and immunities which belong to the defendant under the Constitution of the United States, it was not obliged to send notices to the assured under this policy.

"And if you find from the evidence that Guy C. Phinney, the assured, did not pay to the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the case if you find that he did not pay the premium falling due upon the policy September 24, 1892.

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

There was positive, certain, and direct evidence that the premiums of 1891 and 1892, on the policy in suit were not paid, and no evidence to rebut this positive, certain, and direct evidence.

Twentieth Exception.

After the conclusion of the evidence and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the

Court, in writing, to give the following instruction to the jury:

"Notwithstanding the requirements of the statute of New York, that notices in a particular form and at a time prescribed shall be sent by life insurance companies before they shall have power to declare a policy of life insurance forfeited, yet if the jury finds from the evidence that the defendant sent a notice to the said Guy C. Phinney, although such notice was not in the form, nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said said premium, came to the representative of the company and requested further time in which to pay said premium, and such extenson of time was refused by siad representative, and the said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and that said premium was not paid, nor tendered by, or on behalf of, said Phinney, at its maturity, then you are instructed that such conduct on the part of said Phinney, and of the representative of the company, would constitute a recognition by said Phinney of the notice sent as a valid notice; and a waiver on the part of said Phinney of the notices in the form, and at the same time required by the New York statute, if the same were otherwise applicable. If you so find the facts to be, you must find a verdict for the defendant."

Which said instruction the court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted, in writing, to the refusal of the Court to

give said instruction, and said exception was duly allowed by the Court.

E. L. Stinson, a witness on behalf of the defendant, having been duly sworn, testified among other things, as follows:

G. Now, what was the course of business of the company at that time in reference to the collection of renewals upon policies, that is, second and subsequent—that is, the premiums of second and subsequent years?

A. I received a monthly statement from Mr. Forbes inclosing the renewal receipts due that month. They were forwarded to me, and by me collected, and the proceeds remitted to Mr. Forbes.

Q. What was done with the renewal receipts when the premium was collected?

A. They were given to the assured.

Q. And in case of their not being collected?

A. Returned to Mr. Forbes.

Q. Now, the second premium of Mr. Phinney became due September 24, 1891. State whether or not you sent out notices to the different policy holders?

A. Yes, sir.

Q. Was any other notice sent out?

A. Mr. Forbes sent a notice from San Francisco as well.

Q. Now, on the case of Mr. Phinney, was such notice sent by you, that is, before the second year's premium matured?

A. I presume it was. I sent them to all the policy holders.

Q. What did Phinney do in response to that notice, if anything?

A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company, and asked me if I could not take his note for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company, and they would take only cash. I think a few days before it was due, perhaps three or four days, I met him again, and we had a similar conversation, and I told him about the same again, that I was unable to carry his notes; that I did not have the cash to put up to the company.

Q. Did he ever make any payment of that premium to you? A. Not to me; no, sir.

Q. Who else in the State was authorized to receive and collect premiums. A. No one.

Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due and was unpaid with reference to this particular premium?

A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten days, I should say—between one and two weeks after it was due, he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it, and then he told me that he was prepared to pay the premium.

Q. What, if anything, did he ask you to do?

A. He told me if Iwould bring the renewal receipt, or words to that effect, that he would pay the premium.

Q. State what occurred between you and what you said to him and what he said to you.

A. I told him that I could not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank—I am not positive about that. He told me that he did not think he could pass for a certificate of health, from the fact that he had been rejected by the Equitable a few days before.

Q. Now were any steps taken by you or by Mr. Phinney, to your knowledge, to ascertain whether or not he could obtain a certificate of health?

A. I saw Dr. Eagleson, the company's medical examiner, and requested him to examine Mr. Phinney and furnish a certificate of health. He told me that he had examined him recently for the Equitable, and that they had refused the policy, and it would be useless to try to pass him for the reinstatement.

Q. You had the renewal receipt at that time in your possession? A. Yes, sir.

Q. What was done with that?

A. I returned it to Mr. Forbes.

Q. I will ask you whether or not Mr. Phinney at any time presented you the money for this premium?

A. No, he did not.

Q. Well, was there any further transaction between you and Mr. Phinney with reference to this insurance or the policy?

A. We had, I think, several conversations after that in a general way. I think it was in December, possibly January, following, I was in Mr. Phinney's office and we got to talking about insurance, and the subject of this policy came up and I requested him to let me have the policy to use for canvassing purposes, and he stated the same having lapsed he had no further use for it, and I could take it if I wanted it.

Q. Did you take it?

A. I took it at that time, as near as I can remember.

Q. Do you remember whether or not you did use it for canvassing purposes?

A. I do not remember that particular policy; I had several in large amounts—I don't know whether I used it or not.

Q. I will ask you whether or not it was customary in your business where policies have been lapsed to get the policy? A. Well, I did it in large policies ?

Q. You were still the agent of the company? I think you said until the latter part of 1893? A. Yes, sir.

Q. State whether or not the premium of 1892 was paid or tendered. A. Not to me.

Q. Now, until you left the service of the company in the latter part of 1893, I will ask you whether or not any claim was made by Mrs. Phinney to you regarding that policy? A. Not to me.

Q. I will ask you whether or not she or anybody else representing her ever made any inquiry regarding it.

A. Not to me.

Q. After you received this policy, this conversation between yourself and Mr. Phinney, I will ask you whether or not Mr. Phinney ever made any claim that this policy was not lapsed. A. No.

Mr. Stinson, on cross-examination, testified as follows:

Q. Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in a general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. And you say later on you went to the office and borrowed this policy. A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect.

A. Words to that effect; yes, sir.

Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours? A. Yes, sir.

Q. Now, you didn't mean to tell him an untruth?

A. No, sir.

Q. You know now that it was not true, don't you?

A. What?

Q. That the policy was not forfeited, but you thought it was forfeited, but as a matter of fact it was not forfeited at that time?

Defendant objeits as calling for a conclusion of law.

Objection sustained. Exception allowed.

Q. Well, Phinney permitted you to take the policy?

A. Yes, sir.

Q. Did you ever return it to him?

A. Not to my knowledge. I don't remember that I did.

Q. What became of this policy?

A. I don't know.

Q. You have n't got it now? A. No.

Q. You say Phinney let you have this policy for canvassing purposes? A. Yes, sir.

Q. You asked him for it for that purpose?

A. Yes, sir.

Q. Now, you would not care to have a dead policy for canvassing purposes, would you?

A. It would not make any difference whether it was dead or alive.

Q. You would not want to say that Phinney has a policy issued for a hundred thousand and it was such an expensive contract.

A. That is the part I should not state if I was canvassing. Ishould show the contract.

Q. For the purpose of soliciting you would let them understand it was alive policy? A. Yes, sir.

Mr. POND, witnes in behalf of defendant, testified as follows:

"I think the first intimation I had of any claim from Mrs. Phinney, was the coming in my office of some clerk, who told me that Mrs. Phinney had telephoned to know about her husband's insurance. And so as soon as I came in I looked up the record. That was about the first knowledge I had that there was a policy, or had been a policy at all. I found out in the old book that there was a policy for one hundred thousand dollars taken in 1890, and lapsed after the payment of the first premium."

The deposition of Richard A. McCurdy, president of the defendant company, was taken, and the same was introduced in evidence, and among the questions and interrogatories propounded to him were the following:

Q. What relation, if any, existed between F. L. Stinson, of Seattle, Washington, and the said Mutual Life Insurance Company of New York, between 1890 and 1893?

A. A. B. Forbes was general agent for the Pacific Coast, including the State of Washington. No relation existed between this company and F. L. Stinson.

Q. If in answer to interrogatory four you say that F. L. Stinson, of Seattle, Washington, represented said Mutual Life Insurance Company of New York, as agent, state fully his powers and duties in every particular. If his agency was created by writing, attach the original writing, or a copy, and properly identify it.

A. Mr. Stinson did not represent the company as its agent.

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by or on behalf of the company,, looking toward that end. A. I do not know of any.

Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach a copy of same to this deposition and properly dentify it. A. I know of nothing.

Q. Attach to your deposition every writing of every kind or description between the Mutual Life Insurance Company of New York and its agents, or between it and Guy C. Phinney, that in any manner related to or is connected with a waiver, abandonment, or rescission of the contract.

A. There are no writings in this office, excepting Mr. Forbes' report of the premium unpaid and the executive direction not to restore, which latter is as follows: Forfeited September 24th, 1891. Do not restore. 2nd Vice-President. 28th March, 1892.

The deposition of H. E. DUNCAN, corresponding secretary of the said Mutual Life Insurance Company of New York, was taken, and among the interrogatories propounded to him, and his answers thereto, are the following:

Q. What negotiations were had, if any, with Guy C. Phinney looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by or on behalf of the company, looking toward that end.

A. Mr. Forbes had charge of that matter, and it was attended to in the West.

Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission on the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach a copy of same to this deposition and properly identify it.

A. Mr. Forbes has charge of this matter, and it was attended to in the West.

Q. Attach to your deposition every writing, of every kind and description, between the Mutual Life Insurance Company of New York and its agents, or between it and Guy C. Phinney, that in any maner related to or is connected with a waiver, abandonment, or rescission of the contract?

A. No such writings on file in this office. It was attended to in the West.

Q. If your answer to the preceding interrogatories discloses that the policy appeared on the books of the insurance company as a dead, or terminated policy, state whether it was designated as a lapsed or forfeited policy.

A. I produce here a book of the company, and the entries thereon are as follows: Forfeited September 25th. Do not restore. 2nd Vice-President. 28th March, 1892.

Said A. B. FORBES, general agent of the Pacific Coast for defendant, being called as a witness by plaintiff, testified as follows:

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said and done by or on behalf of the company looking toward that end?

A. That was a matter that I left the detail of it to my agent here. I gave him the principal instructions, and the rest he had to perform.

Q. What instructions did you give him?

A. By telegram.

Q. Any other?

A. Perhaps a letter confirming the telegram.

Q. These documents have been put in evidence in this case?

A. I think so—I don't know whether they have or not.

Q. I will ask you to look at that copy attached to your deposition, Mr. Forbes, and state if that is your signature.

A. That is my signature there; this letter is a copy of the one received from Mr. Stinson.

Q. Please look at the document which I hand you, and state what that is? (Showing witness plaintiff's identification K.)

A. That is a letter from Mr. Stinson returning the premiums unpaid.

Plaintiff offers in evidence plaintiff's Exhibit "K," for identification.

Objected to by defendant as incompetent and not proper rebuttal.

Objection overruled. Exception allowed.

EXHIBIT "K."

Seattle, Washington, Nov. 26, 1891.

A. B. Forbes, Esq., Gen'l Agt.

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

114293	Curtis	No. 393675	Rogers
415957	Cushing	416309	Rice
418420	Calhoun	420062	Benson
441063	Raymore	441073	Patterson

September.

51342	Janney	270465	McKay
287091	O'Connor	307195	Mohr
373328	Finch	373520	Heaton
375371	Buttner	412636	Anderson
418608	Monroe	422198	Phinney [Offered to pay butin [ill-health
434207	Behrman		

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipt asked for will be reported in next acct.

Yours very truly,

F. L. STINSON.

[Endorsed]: "Plaintiff's Exhibit 'K.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. I show you Plaintiff's Exhibit "L" for identification.

A. Yes, sir. That is a letter I received from Mr. Stinson.

Plaintiff offers in evidence Plaintiff's Exhibit "L" for identification.

Paper received without objection, and marked Plaintiff's Exhibit "L."

EXHIBIT "L."

"Seattle, Washington, Dec. 10, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: Your wire of the 9th inst. reading, 'If tendered decline acceptance September premium No. 422198, Phinney,' duly received.

This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON."

Across the face appears:

"A. B. Forbes, Dec. 14, 1891, General Agent, S. F."

[Endorsed]: "Plaintiff's Exhibit 'L' filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did you, on or about the 9th day of December, 1891, on receipt of telegraphic instructions from the company, repeat the same to Mr. Stinson at Seattle in these words: "If tendered decline acceptance of September premium 422198?"

A. I presume that is the record there; that is so. We repeated the telegram as we received it from New York.

Q. And you state, as I understand you, that you know

nothing of any negotiations looking to the rescission or abandonment of the Phinney policy?

A. No; for this reason, we sent the premium receipt to New York as forfeited. It was notice to the company of all that. Their wires covered all the ground, and then the details had to be left with the agent here.

Q. That settled the matter so far as you were concerned?

A. That settled the matter as far as I was concerned. I will say here, it is not an uncommon thing to have people pay the first year's premium and then come in and want to negotiate for time or something I cannot give them, and they hand over their policies.

The following exhibits were introduced in evidence without objection:

EXHIBIT "D."

New York, July 19th, 1894.

Mrs. Nellie Phinney, 1201 James street, Seattle, Washington.

Madam: Acknowledging receipt of yours of the 12th inst., we beg to advise you that policy 422198 on the life of the late Guy C. Phinney was issued September 24, 1890, and was forfeited September, 1891, for nonpayment of premium. This policy, therefore, has no value. If you desire any further information regarding this insurance, we respectfully suggest that you should communicate

with our general agent, Mr. A. B. Forbes, San Francisco, Cal., through whose agency this policy was issued.

Yours very truly,
H. E. DUNCAN, Jr.,
Corresponding Sec.

[Endorsed.]

EXHIBIT "E."

Seattle, Wash., July 24, 1894.

Mrs. Guy C. Phinney, City,

Dear Madam: We beg to advise you that but one annual premium was paid under your husband's policy 422198 for $100,000, and therefore the policy lapsed in Sept., 1891. Our senior, Mr. Pond, is in Portland, and upon his return will probably take the first opportunity to call upon you and explain this information in detail.

Yours very truly,
WM. S. POND, Manager,
Per Geo. R. Carter.

[Endorsed.]

After the commencement of this action, and after defendant had appeared and demurred, defendant, by its attorneys, demanded that plaintiff produce this said policy, that it might inspect the same, and plaintiff thereafter made a like demand upon defendant.

On April 23, 1895, plaintiff sued out a commission for the taking of the depositions of H. E. Duncan, Richard A. McCurdy, and W. J. Easton, all officers of the defendant corporation; also for the taking of the depositions of A. B. Forbes and Stanley Forbes. Said A. B. Forbes, from September 24th, 1890, to the commencement of

the suit, was general manager of said defendant company for the Pacific Coast, including Washington, and Stanley Forbes during all of said times being its cashier. That thereupon said plaintiff filed her interrogatories to be propounded to each of said witnesses, and served a copy thereof on defendant's attorneys. That among the interrogatories to be propounded to said Richard A. McCurdy, also said W. J. Easton, also to H. E. Duncan, also to said A. B. Forbes, and also to said Stanley Forbes, were, among others, the following interrogatories:

Q. State fully what form of premium notices were used, if any, by the Mutual Life Insurance Company of New York, to notify the parties insured in said company that premiums would become due on policies issued through Pacific Coast agencies, on parties residing in the State of Washington, during the years 1890, 1891, 1892, and 1893. If more than one form was used, state fully what each contained.

Q. Attach to this deposition copies of each and every form of notices used as described in the preceding interrogatory during the time therein mentioned.

On May 3 defendant's attorneys filed written exceptions thereto on the ground that the same were incompetent, irrelevant, and immaterial.

On May 21, 1895, plaintiff and defendant each appeared before the Honorable C. H. Hanford, Judge of said Court, for the purpose of settling said interrogatories, and defendant insisted upon each of said objections and exceptions to said interrogatories.

On May 21, plaintiff, by her attorneys, stated that she

desired and insisted that said interrogatories should be answered. That she might need them for the purpose of rebuttal in case defendant should claim that it had sent or mailed any notice to Guy C. Phinney, or claim any benefit of any notice claimed to have been sent to said Phinney. That the answers of said witnesses, together with other evidence that plaintiff would have at hand, would enable plaintiff to prove that the notice required by the statute of New York had never been mailed to said Phinney. That plaintiff desired to prove the custom of said defendant as to the mailing of notices to its policy holders, under any and all circumstances. That such evidence would disclose the fact that no notice was mailed at all to Guy C. Phinney. Whereupon said defendant, by its attorneys, then stated and declared to plaintiff and said Court that said defendant was not claiming to have mailed any notice to said Phinney. That it had not alleged in its answer that it had mailed any notice to said Phinney, and was not claiming and would not claim any benefit from the mailing or sending any notice to said Phinney. Whereupon, relying upon the statements of said counsel, said Court sustained defendant's objections and exceptions to said interrogatories and denied to plaintiff the right of having said interrogatories answered.

Twenty-first Exception.

After the conclusion of the testimony and prior to the argument of counsel, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"Notwithstanding the requirements of the statute of New York that notices in a particular form and at the time prescribed shall be sent by life insurance companies, before they shall have power to declare a policy of life insurance forfeited, yet, if the jury find from the evidence that the defendant sent a notice to the said Guy C. Phinney, although such notice was not in the form, nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney before the maturity of said premium came to the representative of the company, and requested further time in which to pay said premium, and such extension of time was refused by said representative, and said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and that said premium was not paid, or tendered by or on behalf of said Phinney at its maturity, then you are instructed that such notice so sent and acted upon would constitute a sufficient compliance with the provisions of the statute of New York, in regard to the sending of notice, although the said notice was not in the form prescribed nor at the time required by said statute; and if you find the facts so to be, you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and the said exception was duly allowed by the Court.

The evidence relating to the matter referred to in

said requested instruction is set forth in exception number twenty.

Twenty-second Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"If you find from the evidence in this case that the said Phinney did not pay the premium falling due September 24, 1891, and by his subsequent course led the defendant to believe that he considered his policy forfeited, and that he no longer relied thereon as a binding contract, and that he had abandoned the same, then his executrix would be estopped from now asserting the validity of said policy in this action; and if you find the facts so to be, you will find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

The evidence relating to the matters referred to in said requested instruction is set forth in exception number twenty.

Twenty-third Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"If you find from the evidence that said Phinney did not pay or tender the premium falling due on September 24, 1891, and that his course of conduct with the defendant prior to his death and the course of dealing with the defendant of the plaintiff subsequent to his death are inconsistent with the idea that they or either of them relied upon the policy as a valid contract, and such as to lead thedefendant to believethat no reliancewas placed by them in said policy as a valid contract, and that the same had been abandoned, the plaintiff would be estopped from now asserting the validity of said contract; and if you so find the facts to be, you must find a verdict for the defendant."

Which instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

F. L. STINSON, a witness in behalf of the plaintiff, having been duly sworn, testified as set forth in the twentieth exception herein. And NELLIE PHINNEY, called as a witness in her own behalf, testified, among other things, as follows:

Q. Did you ever mail a letter to the Mutual Life Insurance Company of New York as executrix?

A. I did.

Q. I hand you this paper, and ask you if you can identify that as a copy of this letter?

A. I do, Mr. Warburton.

Plaintiff offers in evidence paper identified by witness.

Paper admitted without objection, and marked Plaintiff's Exhibit "C."

EXHIBIT "C."

"Seattle, Wash'n, July 11th, 1894.

The Mutual Life Insurance Co. of New York:

Gentlemen: In September 24, 1890, my husband, Guy C. Phinney, took out a policy, No. 422198, in your company in the sum of one hundred thousand dollars. He died in this city last September 12, 1893. Not being familiar with his affairs, and the policy being mislaid, I was not aware that he held such a policy until a few days ago, when the matter was brought to my attention. You will please consider this a notice of his death and a request for the payment of the policy. If there are any other preliminaries required before you will pay the same, or anything further you require me to do, advise me at once, and I will be ready to comply therewith. I am the executrix of his estate.

Yours sincerely,

NELLIE PHINNEY,

Executrix of the estate of Guy C. Phinney."

Q. By Mr. Gilman.—Mrs. Phinney, this letter of July 11, 1894, was the first communication that you made to the company concerning the policy of your husband?

A. It was.

Q. How long before that had you learned that he had such a policy?

A. Well, I had always understood—a long time, that Mr. Phinney had this policy.

Q. You had understood for a long that he had held such a policy? A. That he held such a policy.

Q. Why then did you state in your letter this: "I was not aware that he held such a policy until a few days ago, when the matter was brought to my attention" ?

A. I do not remember.

Q. Is it a fact as stated in that letter to the company, that you were not aware that he held such a policy until a few days ago when it was brought to your attention? Just refresh your memory and see if it had not been brought to your attention just a few days before it was written.

A. No, I had always known that he carried a policy; I don't know that I knew just the name of the company exactly, but I always understood that he carried a hundred thousand dollar policy.

Q. From whom did you gather the information that you speak of in that letter?

A. The first party I spoke of it I think was to Mr. Higgins of Victoria.

Q. Do you know where Mr. Higgins got his information? A. I do not.

Q. You know at the time that Mr. Phinney died that he had a hundred thousand dollar policy insurance?

A. I did.

Q. That was alive? A. I did.

Q. Why then in your petition for letters testamentary to the Superior Court of this county, did you state that his estate only amounted to only fifty thousand dollars?

A. I do not remember just now.

Q. Now as a matter of fact, Mrs. Phinney, did not Mr. Phinney before his death tell you that he had given up this hundred thousand dollar policy?

A. He did not.

Q. Can you give any explanation, then, why you put this estate at fifty thousand dollars?

A. No, I cannot. I don't know what I did.

Q. You knew then before his death that he held a hundred thousand dollar policy in the Mutual Life?

A. I did.

Q. You knew that fact? A. Yes, sir.

Q. He told you that fact? A. He did.

Q. Why did you wait nine months before you wrote the Mutual Life in reference to that policy?

A. Well, I was very ill for a number of months after Mr. Phinney's death.

Q. Mrs. Phinney, Mr. Phinney had other life insurance? A. He did.

Q. How long after his death did you wait before you put in a claim for that insurance?

A. I could not tell you just how long. I do not remember.

Q. Did you not put in a claim on the other insurance within a month after his death? A. Yes, sir.

Q. And yet, knowing that he held this hundred thousand dollar policy in the Mutual Life you waited nine months before making the claim?

A. The policy could not be found.

Q. You never did find it, did you? A. No.

Q. You haven't it now, have you? A. No.

claim? A. No.

Q. You did not have it when you finally did make the

Q. Why didn't you write this company before and ask them to pay it, instead of waiting nine months before doing it?

A. I was too ill at the time to attend to it.

Q. You were not too ill to collect your other policies? You had an attorney, didn't you, who was managing this matter for you, Mr. Burleigh? A. I did.

Q. Did you ever tell Mr. Burleigh that that hundred thousand dollar policy was in existence?

A. I think I did.

Q. He took no steps to collect it?

A. I don't know that he did.

Q. You don't know that Mr. Burleigh took no steps to collect the hundred thousand dollars belonging to you, although you told him about it? A. Yes, sir.

Q. Is it not a fact you didn't know anything about this policy until Mr. Warburton came over from Tacoma and told you about it? A. No, sir.

Q. Had not you had a consultation with Mr. Warburton before you sent that letter? A. Yes, sir.

Q. And did not Mr. Warburton tell you that he had another case—same kind of a case?

A. I think he did.

Q. And it was not until after Mr. Warburton told you that you ever thought of putting in any claim on this policy—is not that a fact, Mrs. Phinney?

A. No, sir.

Q. But it was after Mr. Warburton told you that you did put in a claim on the policy? A. Yes, sir.

Q. Mr. Burleigh drew this petition for letters testamentary, didn't he? A. I think he did.

Q. Did you tell him at that time what property Mr. Phinney owned? A. I do not remember.

Q. Did you tell him about that hundred thousand dollar policy at that time? A. I think I did.

Q. You swore to this petition, and swore that the estate was fifty thousand dollars?

A. I do not remember.

Q. Where did you find Mr. Phinney's policies of life insurance at the time of his death?

A. I did not find them myself.

Q. Did you ever make any search for this policy?

A. Search has been made—not by me.

Q. You did not make any search personally?

A. No, sir.

Q. Mrs. Phinney, the fifty thousand dollars on your husband's, and the ten thousand dollars was payable to the children? A. To the children.

Q. Neither one of these policies belong to the estate?

A. No, sir.

In addition to said evidence in her own behalf plaintiff introduced a certified copy of her petition for the probate of the last will and testament of Guy C. Phinney, deceased, which was received as evidence and marked Exhibit "A," and is as follows:

EXHIBIT "A."

"In the Superior Court for the County of King, State of Washington. In the matter of the estate of Guy C. Phinney, deceased. Petition for probate of will. To the Honorable the Superior Court for the County of King, State of Washington.

"The petition of Nellie Phinney of the county of King, State of Washington, respectfully shows that Guy C. Phinney died on or about the 12th day of September, 1893, at the said county of King, State of Washington, being then and there of the age of forty-one years; that said deceased was at the time of his death a resident of the said county of King, and left estate therein consisting of real and personal property; that the probable value and character of said estate are as follows, to-wit:

"Real estate, consisting of lands in said King county, of town lots in the city of Seattle, and of improved city property, the exact description of all which is at this time unknown to your petitioner, but which is entirely community estate, the value of which is about three hundred thousand dollars; that there is personal property of various kinds, all of the same being community property, of the value of about fifty thousand dollars; that the total estate of said deceased, including the community interest of your petitioner, who is the widow of said deceased, does not exceed in value the sum of about three hundred and fifty thousand dollars; that said deceased left a will bearing date of the first day of September, 1893, in the possession of your petitioner, which your petitioner believes, and therefore alleges, to be the last will and testament of said deceased, and which is presented to said Superior Court; that your petitioner, Nellie Phinney, named in said will as executrix thereof, consents to act as such, and that Willie Carleton Phinney and Arthur Alexander Phinney, sons of said deceased, are named therein as devisees; that the subscribing witnesses to said will are

Charles J. Brenton, residing at the city of Seattle, King County, Washington, and William W. Grass, residing at the city of Seattle, King County, Washington; that the next of kin of said deceased, as your petitioner is advised and believes, and therefore alleges, to be the heirs of law of said deceased, and the names, ages, and residences of said heirs are his surviving wife, Nellie Phinney, your petitioner, aged about twenty-six years, residing at the city of Seattle, King County, State of Washington, his said sons, Willie Carleton Phinney, aged about 9 years, and Arthur Alexander Phinney, aged about 8 years, residing at said city of Seattle; that at the time said will was executed, to-wit, on the first day of September, 1893, the said testator was over the age of twenty-one years, to-wit, of the age of forty-one years, or thereabouts, and was of sound and disposing mind and memory and not acting under duress, menace, fraud, or undue influence, and was in every respect competent by last will to dispose of his estate; that said will is in writing, signed by said testator and attested by said subscribing witnesses at the request of said testator, subscribing their names to the said will in the presence of the said testator and in the presence of each other; and that as your petitioner is advised, and therefore alleges, said witnesses at the time of attesting the execution of said will were and are now competent; that in and by said will said testator provided that said estate should be settled in the manner provided in said last will and testament, and that letters testamentary or of administration should not be required, except such will should be admitted to probate in the manner required by existing laws, and that after the probate of such will

said estate should be managed and settled without the intervention of the Court, as in said last will and testament provided.

Wherefore, your petitioner prays that the said will may be admitted to probate and for that purpose, and that the time for proving said will be appointed, that all persons interested be directed to appear at the time appointed for proving the same, and that upon the probate of said will an order may be made vesting said estate in your petitioner as executrix, to be managed and settled as provided by law, and by said last will and testament, without the intervention of the Court, and that all other necessary and proper orders may be made in the premises, and your petitioner will ever pray, etc.

Dated this 16th day of September, 1893.

NELLIE PHINNEY, Petitioner.

A. F. BURLEIGH,
Attorney for Petitioner.

State of Washington, }
County of King. } ss.

Nellie Phinney, being first duly sworn, deposes and says that she is the petitioner in the foregoing petition; that she has heard the same read, and knows the contents thereof, and believes the same to be true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 16th day of September, 1893.

[Seal] ANDREW F. BURLEIGH,
Notary Public, residing at Seattle, King County, Wash.

Filed September 18, 1893. T. W. Gordon, Clerk. By D. C. Gordon, Depy.

In the Superior Court of the State of Washington for the County of King.

State of Washington, } ss.
County of King. }

I, T. J. Humes, Judge of the above-entitled Court, the same being a Court of record, do hereby certify that T. W. Gordon is the clerk of said Court, and was such clerk at the time of making and subscribing the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name, at Seattle, King County, Washington, this 22nd day of July, 1895.

T. J. HUMES,
Judge of the Superior Court of King County, Washington.

On redirect examination, plaintiff, Mrs. Nellie Phinney, testified as follows:

Q. By Mr. Warburton.—You say that Mr. Phinney never told you this policy was forfeited? A. No.

Q. Did he ever tell you it was alive? A. Yes.

Q. How many times did he tell you it was alive?

A. I could not tell you just how many times, but a number of times.

Q. How long prior to his death did he mention this policy as being one of his policies of insurance that was in force? A. Not more than two weeks.

Q. Did he give you any directions as to the use of the insurance you should collect? A. Yes, sir.

Q. Mention this policy among them?

A. Yes, sir.

Q. You say you did have several conversations with Mr. Burleigh about this?

A. Well, I don't know several—I know I have talked with Mr. Burleigh.

Q. Did you talk to others about it?

A. No.

Q. State the condition of your health, Mrs. Phinney, immediately after the death of your husband.

Objected to by counsel for defendant as immaterial.

Objection overruled, exception allowed.

Q. For the first nine months after Mr. Phinney's death.

A. The first year after Mr. Phinney's death I was seriously ill.

Q. Were you able to attend to business at all during that time? A. No; I was not.

Q. These policies were collected by your agent, were they not? A. Yes, sir.

Q. The business matters were all turned over to the other parties?

A. All done through other parties.

Q. Who prepared that letter, Mrs. Phinney, that you mailed to New York?

Objected to by counsel for defendant as immaterial.

And WM. S. POND, being called as a witness on behalf of the defendant, testified among other things, as follows:

Q. By Mr. Gilman.—You reside in Seattle?

A. In Seattle, Washington.

Q. And what is your business?

A. I am at present the general agent of the Mutual Life Insurance Company of New York.

Q. What territory does your agency cover?

A. Washington, Oregon, and British Columbia.

Q. How long have you held that position?

A. Since the first of January, 1895.

Q. Were you connected with the company before that time? A. Before that I was a representative of Mr. Forbes of San Francisco.

Q. What I want to get at is this—did you assume Stinson's position at the time he left it?

A. Yes, sir; I assumed it as manager for Forbes; and in the first of this year I was appointed the general agent direct from New York.

Q. So that since Stinson left the company you have been its head in this State? A. Yes, sir.

Q. And that was in the latter part of 1893, that you assumed that position?

A. Well, in November, 1893, I came here as cashier for Mr. Forbes, and it was after Mr. Stinson was discontinued that I became manager.

Q. Now, during the time that you have had charge of the business of the company in this State up to July, 1894, what, if any, claim was made by Mrs. Phinney to you upon the policy now in suit?

A. There was no claim made until an inquiry was made in July, 1894.

Q. Who made that inquiry? A. The first inquiry came by telephone, I could not identify it exactly.

Q. I will ask you whether or not you ever learned from Mrs. Phinney who it was that telephoned?

A. I think the first intimation I had of any claim from Mrs. Phinney was the coming to my office of some clerk who told me that Mrs. Phinney had telephoned to know about her husband's insurance, and so as soon as I came in, I looked up the record. That was the first knowledge I had that there was a policy at all. I found out in the old book that there was a policy for one hundred thousand dollars taken in 1890, and lapsed after the payment of the first premium.

Q. Did you go to the telephone?

A. Yes, and within a day I think I called up Mrs. Phinney myself. I am not sure it was a telephone at the residence or how it was, but I communicated a second time; but she asked if I was the manager, and I said yes, and she inquired whether Mr. Phinney had a policy in the company, and I inferred from the conversation that she didn't know how much it was, or the number of it, or anything about it—in fact, she asked me the amount.

Q. At that time did Mrs. Phinney ask the amount of the policy?

A. Yes, sir, asked for how much he was insured, I said he had a policy for a hundred thousand dollars, but it was not in force. I think she inquired whether it was possible that it would be in force, and I said no, not unless the premiums had been paid direct to the home office which seemed highly improbable, because both he and Stinson lived in the city, and the natural course would be to pay them through him, so I then wrote to San Francisco to inquire if possibly these premiums had been paid, and found

out substantially that the policy had lapsed after the payment of the first premium. Reference is also made to all the evidence above set forth under the 20th exception.

Twenty-fourth Exception.

After the conclusion of the evidence, and prior to the argument of counsel, and prior to the charge of the Court to the jury, the defendant requested the Court in writing to give the following instruction to the jury

"If you find from the evidence that the said Guy C. Phinney stated to defendant's representatives in the State of Washington that he could not pay his premium falling due on the 24th day of September, 1891, it was equivalent to his saying that he could not go with the contract, and that he abandoned the same, and if you find that the defendant assented thereto, then this would end the contract; and if you so find the facts to be, you must find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

The evidence relating to the matters referred to in said requested instruction is set forth in exception number twenty.

Twenty-fifth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant requested the Court in writing to give the following instructions to the jury:

"If you find from the evidence in this case that the said Guy C. Phinney stated to the representatives of the defendant in the State of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representative, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the nonpayment of the said premium, this would constitute an abandonment and rescission of this contract by both parties thereto, and would put an end to the same; and if you find the facts so to be, you must find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

The evidence relating to the matters referred to in said requested instruction is set forth in exception number twenty.

Twenty-sixth Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charges of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"The statute of New York relied upon by the plaintiff relieves against the forfeiture without the sending of a proper notice in a single instance only. It does not contemplate successive defaults, nor does it in a particular

case relieve the assured of more than one default. The assured cannot go on year after year without the payment of premiums, and have his policy still kept alive by the statute, and if successive defaults occur the policy is forfeited, notwithstanding the provisions of the law of New York of 1876 and 1877, and only in a proper case the policy holder is entitled to the benefit of the act of New York of 1879 relating to the surrender value of policies forfeited.

"And if you find from the evidence that Guy C. Phinney did not pay the premium of 1892, you must find a verdict for the defendant."

Which said instruction the Court refused, whereupon defendant, while the jury was still at the bar, excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

There was positive, certain, and direct evidence that the premium falling due on the policy in suit September 24, 1892, was not paid, and nothing to rebut this evidence.

The other evidence relating to the matters referred to in said requested instruction is set forth in exception No. 20.

Twenty-seventh Exception.

After the conclusion of the evidence and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court, in writing, to give the following instruction to the jury:

"Upon all the evidence in this case you are instructed to find a verdict in favor of the defendant."

Which said instruction was refused by the Court, whereupon, and while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

The following is all the evidence in the case:

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 418.

Transcript of Testimony and Proceedings.

This case coming on regularly for trial this 25th day of July, A. D. 1895, before Hon. C. H. HANFORD, Judge, and a jury, plaintiff appearing in person and by S. Warburton, Esq., A. F. Burleigh, and Murry & Christian, her counsel, and the defendant appearing by its agents, and by Messrs. Strudwick & Peters, and L. C. Gilman, Esq., of Stratton, Lewis & Gilman, of counsel, the following testimony was offered and proceedings had:

Plaintiff's Testimony.

Plaintiff offers in evidence certified copy of petition for probating of last will and testament of Guy C. Phinney, deceased.

Paper received without objection, and marked plaintiff's Exhibit "A."

EXHIBIT "A."

"In the Superior Court for the county of King, State of Washington. In the matter of the estate of Guy C. Phinney, deceased. Petition for probate of will. To the Honorable, the Superior Court of the county of King, State of Washington.

The petition of Nellie Phinney, of the county of King, State of Washington, respectfully shows, that Guy C. Phinney died on or about the 12th day of September, 1893 at the said county of King, State of Washington, being then and there of the age of forty-one years; that said deceased was at the time of his death a resident of the said county of King, and left estate therein consisting of real and personal property; that the probable value and character of said estate are as follows, to-wit:

Real estate, consisting of lands in said King county, of town lots in the city of Seattle, and of improved city property, the exact description of all which it at this time unknown to your petitioner, but which is entirely community estate, the value of which is about three hundred thousand dollars; that there is personal property of various kinds, all of the same being community property of the value of about fifty thousand dollars; that the total

estate of said deceased, including the community interest of your petitioner who is the widow of the said deceased, does not exceed in value the sum of about three hundred and fifty thousand dollars; that said deceased left a will bearing date of the first day of September, 1893, in the possession of your petitioner which your petitioner believes, and therefore alleges, to be the last will and testament of said deceased, and which is presented to said Superior Court; that your petitioner, Nellie Phinney, named in said will as executrix thereof, consents to act as such, and that Willie Carleton Phinney and Arthur Alexander Phinney, sons of said deceased, are named therein as devisees; that the subscribing witnesses to said will are Charles J. Brenton, residing at the city of Seattle, King county, Washington, and William W. Grass, residing at the city of Seattle, King County, Washington; that the next of kin of said deceased, as your petitioner is advised and believes, and therefore alleges, to be the heirs of law of said deceased, and the names, ages, and residences of said heirs, are his surviving wife, Nellie Phinney, your petitioner, aged about twenty-six years, residing at the city of Seattle, King county, State of Washington, his said sons, Willie Carleton Phinney, aged about nine years, and Arthur Alexander Phinney, aged about 8 years, residing at said city of Seattle; that at the time said will was executed, to-wit, on the first day of September, 1893, the said testator was over the age of twenty-one years, to-wit, of the age of forty-one years or thereabouts, and was of sound and disposing mind and memory, and not acting

under duress, menace, fraud, or undue influence, and was in every respect competent by last will to dispose of his estate; that said will is in writing, signed by said testator, and attested by said subscribing witnesses at the request of said testator, subscribing their names to the said will in the presence of the said testator, and in the presence of each other; and that as your petitioner is advised, and therefore alleges, said witnesses, at the time of attesting the execution of said will, were and are now competent; that in and by said will said testator provided that said estate should be settled in the manner provided in said last will and testament, and that letters testamentary or of administration should not be required, except such will should be admitted to probate in the manner required by existing laws, and that after the probate of such will said estate should be managed and settled without the intervention of the Court, as in said last will and testament provided.

Wherefore, your petitioner prays that the said will may be admitted to probate, and for that purpose; that the time for proving said will be appointed; that all persons interested be directed to appear at the time appointed for proving the same, and that upon the probate of said will an order may be made vesting said estate in your petitioner as executrix, to be managed and settled as provided by law and by said last will and testament, without the intervention of the Court, and that all other necessary and

proper orders may be made in the premises, and your petitioner will ever pray, etc.

Dated this 16th day of September, 1893.

NELLIE PHINNEY, Petitioner.

A. F. BURLEIGH,

Attorney for Petitioner.

State of Washington, } ss.
County of King, }

Nellie Phinney, being first duly sworn, deposes and says, that she is the petitioner in the foregoing petition; that she has heard the same read, and knows the contents thereof, and believes the same to be true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 16th day of September, 1893.

[Seal] ANDREW F. BURLEIGH,

Notary Public, residing at Seattle, King County, Wash.

Filed September 18, 1893.

T. W. GORDON, Clerk.

By H. C. Gordon, Dep'y.

In the Superior Court of the State of Washington for the County of King.

State of Washington, } ss.
County of King. }

I. T. J. Humes, Judge of the above-entitled Court, the same being a Court of Record, do hereby certify that T. W. Gordon, is the clerk of said Court, and was such clerk at the time of making and subscribing the foregoing certificate, and that the attestation of said clerk is in due form of law, and by the proper officer.

In testimony whereof, I do hereby subscribe my name, at Seattle, King County, Washington, this 22nd day of July, 1895.

T. J. HUMES,
Judge of the Superior Court of King County, Washington.

In the Superior Court of King County, State of Washington.

State of Washington, } ss.
County of King. }

In the matter of the estate of Guy C. Phinney.

I, T. W. Gordon, County Clerk of King County, and ex-officio clerk of the Superior Court of said county, do hereby certify that I have compared the foregoing copy with the original petition for probate of will in the above-entitled proceeding as the same appears on file in my office, and that the same is a true and perfect transcript of said original, and of the whole thereof.

Witness my hand and the seal of the said Superior Court at my office in Seattle, this 22 day of July, 1895.

[Seal] T. W. GORDON, Clerk.

[Endorsed]: "Plaintiff's Exhibit 'A.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres. By R M. Hopkins, Deputy."

Plaintiff offers in evidence a certified copy of the will of Guy C. Phinney, deceased, probate of will, and decree admitting will to probate. Papers received without objection, and marked Plaintiff's Exhibit "B."

Exhibit "B."

"In the Name of God, Amen. I, Guy C. Phinney, of the city of Seattle, county of King, State of Washington, of the age of forty-one years, and being of sound mind and memory, and not acting under duress, menace, fraud, or undue influence of any person whatever, do make, publish, and declare this my last will and testament, in manner following, that is to say:

First. I direct that my body be buried with proper regard to my station and condition in life and the circumstances of my estate.

Secondly. I direct that my executrix hereinafter named so soon as she has sufficient funds in her hands belonging to my estate, pay my funeral expenses and the expense of my last sickness.

Thirdly. I direct that my executrix hereinafter named, as soon as she shall have sufficient funds in her hands, pay or cause to be paid all my just debts so soon as the same shall mature and become and be due and payable.

Fourthly. I here and now recognize, assert, and declare the community right, title, interest, and estate of my wife Nellie Phinney, of, in and to each and every and all of the real estate now owned by me, and of which I may die seized.

Fifthly. I give and bequeath to my dear son, Willie Carleton Phinney, all and singular my sporting case, guns, dogs, and fishing apparatus and outfit for him and his use, benefit, and advantage.

Sixthly. I give and bequeath to my dear son, Arthur Alexander Phinney, my collection of coins, watch and chain for him and his use and benefit and advantage.

Seventhly. I give, bequeath, and devise to my dear children, Willie Carleton Phinney and Arthur Alexander Phinney, to be divided equally between them, share and share alike, all and singularly, the rest, residue, and remainder of my estate, real, personal, and mixed, of which I may die the owner, to have and to hold the same, each and every and all thereof, to them, said Willie Carleton Phinney, and Arthur Alexander Phinney, their heirs and assigns forever. The same to be made over and delivered to them and to each of them when the youngest child, Arthur Alexander Phinney, shall reach the age of twenty-one years. In the mean time out of the rents, issues, and profits of my said estate in this paragraph of my will mentioned and referred, to my executrix hereinafter named or her successor, shall use and expend such proper sums as shall from time to time be necessary and in accordance with the circumstances of my estate for the proper care maintenance, and education of my living children or child

Eighthly. I commit the tuition, care, maintenance, custody, and education of my children, and each of them, for such time as they or either of them respectively continue unmarried and under the age of twenty-one years, unto my wife Nellie Phinney, provided she remain my widow but if she shall die or marry during the single life or non age of either of my said children, I hereby dispose of and commit their tuition, care, maintenance, custody, and edu-

cation to my executor hereinafter named as successor to my wife Nellie Phinney.

Ninthly. In the administration and settlement of my said estate, my executrix and her successor are by me empowered and authorized to do each, every, and all acts act, and things that may become and be necessary, wise, or best; and I here and now provide, order, and direct that my said estate shall be settled by my said executrix or by her successor, as herein directed without the aid, intervention, interference, order, judgment, decree, direction or control of the Superior Court of King County having probate jurisdiction, board, or any other Court or person whatever. That letters or letter testamentary or of administration shall not be required, and that all I require is that this, my last will and testament shall be admitted to probate in the manner required by existing laws, and in the course of the settlement of my estate, if and whenever it shall become and be necessary, wise, and best to sell the same or any part of the same, "always reserving until the last necessity Woodland Park of the supplemental plat of Woodland Park addition to the City of Seattle," at either public or private sale for the *necessary* carrying out of the provisions of this my last will and testament, my said executrix or her successor hereinafter named, may sign, seal, acknowledge, and deliver any and all necessary instruments of conveyance thereof without application to the said Court or any Court, order of sale, or any intervention of said Court whatsoever thereof, and I do further de

clare my will to be and I direct that my said executrix shall not nor shall her successor hereinafter named be required to give any bond, bonds, obligations, or furnish or give any surety or sureties whatever for the faithful performance by them, or either of them, of such trust by me herein and hereby reposed in them.

Lastly. I nominate and appoint my wife Nellie Phinney my executrix of this my last will and testament, to serve as such executrix so long as she shall remain unmarried; and, in case of her marriage or death, I nominate and appoint my brother John Ingalls Phinney, now of Wilmot, Annapolies County, Nova Scotia, to succeed my said executrix in said trust as executor of this my last will and testament, and I hereby revoke any and all former wills by me made, and I declare my will to be that my said executor, John Ingalls Phinney, so nominated as successor to my said executrix, shall receive the sum of five thousand ($5000.00) dollars, and no more, as and for his compensation as such successor and executor.

In witness whereof, I have hereunto set my hand and seal this first day of September, in the year of our Lord one thousand eight hundred and ninety-three (1893).

[Seal] GUY C. PHINNEY.

The foregoing instrument, consisting of five pages besides this one, was, at the date hereof, by the said Guy C Phinney, signed and sealed and published as, and declared to be, his last will and testament, in presence of us, who at his request, and in his presence, and in the presence of

each other, have subscribed our names as witnesses thereto.

CHARLES J. BRENTON,

Residing at the city of Seattle, King county, Washington

WILLIAM W. GRASS,

Residing at the city of Seattle, King County, Washington.

[Endorsed]: 1894. Last will and testament of G. C Phinney. Filed September 18th, 1893. T. W. Gordon Clerk. By H. C. Gordon, Deputy.

"*In the Superior Court of King County, State of Washington*

In probate. In the matter of the estate of Guy C. Phinney, deceased. No. 1814.

Certicficate of Probate of Will.

County of King-ss

I, J. W. Langley, Judge of the Superior Court of said King County, do hereby certify that the annexed instrument purporting to be the last will and testament of Guy C. Phinney, deceased, was by our Superior Court, on the 19th day of September, 1893, duly admitted to probate as and for the last will and testament of the said Guy C. Phinney, deceased.

And from the proofs taken and the examination had thereon, the Court finds as follows:

That said Guy C. Phinney died on or about the 12th day of September, 1893, in King County, in Washington, and at the time of his death was a resident of the county of King in said State of Washington.

That the said annexed will was duly executed by said Guy C. Phinney in his lifetime in the county of King, in said State of Washington, in the presence of Charles J Brenton and William W. Grass the subscribing witnesses thereto; also that said Guy C. Phinney acknowledged the execution of the same in the presence of the said subscribing witnesses and declared the same to be his last will and testament, and the said witnesses attested the same at his request, in his presence, and in the presence of each other

That the said decedent at the time of executing the said will was abov the age of majority, to-wit: of the age of about forty-one years, and was of sound and disposing mind, and not under duress, menace, fraud, nor due influence, nor in any respect incompetent to devise and bequeath his estate.

In testimony whereof, I have hereunto set my hand and caused the seal of the said Superior Court to be hereunto affixed this 19th day of September, 1893.

[Seal] J. W. LANGLEY,

Judge of the Superior Court of King County, State of Washington.

Attest: T. W. Gordon, Clerk of the Court. By H. C Gordon, Deputy Clerk."

In the Superior Court of the State of Washington for the County of King.

In Probate. No. 1814. In the matter of the estate of Guy C. Phinney, deceased.

Decree Admitting Will to Probate.

Nellie Phinney having on the 18th day of September, 1893, submitted to and filed in this Court a certain document in writing, of a testamentary nature, purporting to be the last will and testament of Guy C. Phinney, deceased and also her petition praying, among other things, for the admission to probate of the said document as and for the last will and testament of the said deceased.

And this Court having by order duly made on the 18th day of September, 1893, appointed the 19th day of September, 1893, at 5 o'clock P. M. for the proving of the said will and the hearing of the said petition.

Now, on this 19th day of September, 1893, the hearing of the said petition comes on regularly before the Court in open session; , „ „

And it fully appearing to the satisfaction of the Court that the said petition sets forth all the facts necessary to give this Court jurisdiction over the estate of the said deceased, and jurisdiction to admit to probate the last will and testament of the said deceased, and witnesses have been examined under oath, and their testimony taken and reduced to writing in open Court, to-wit: the testimony of Charles J. Brenton and William W. Grass, subscribing witnesses to the said will, and the same having been filed and the evidence being closed, and the matter having been duly and regularly and finally submitted to the Court for consideration and decision, and all and singular the law and the premises being now by the Court here fully under

stood and duly considered, the Court finds the facts ap plicable to this matter to be as follows: That the said Guy C. Phinney died testate on the 12th day of September 1893, at Seattle, King County, Washington. That at the time of his death the said deceased was a resident of King County, Washington, and left estate in said King County subject to administration in the State of Washington.

That said document, purporting to be the last will and testament of the said Guy C. Phinney, deceased, was duly executed by him in his lifetime, to wit: on the 1st day of September, 1893, at Seattle, King County, Washington in the presence of at least two competent witnesses, to wit: Charles J. Brenton and William W. Grass, the subscribing witnesses thereto, and also that the said deceased then and there, in the presence of the said witnesses, published the said document as, and declared the same to the said witnesses to be, his last will and testament, and the said witnesses then and there attested the same at his request and in his presence and in the presence of each other.

That the said deceased, at the time of executing the said last will and testament, was over the age of majority, to wit: of the age of about 41 years, and was of sound and disposing mind and memory, and not acting under duress menace, fraud, nor any undue influence whatsoever, nor in any respect was he incompetent by last will to devise and bequeath his estate.

That Nellie Phinney is named in the said will as executrix to serve without bonds; that the said Nellie Phinney is a surviving wife of the said deceased, and is a resident of the State of Washington, above the age of twenty-one

years, and a suitable and competent person to act as executor of the last will and testament of the estate of said deceased.

Now, therefore, by reason of the law and facts aforesaid, it is considered, ordered, adjudged, and decreed by the Court here that the jurisdiction to admit the last will and testament of the said deceased appertains unto our said Superior Court; that the said document submitted for probate on the 18th day of September, 1893, is the last will and testament of the said Guy C. Phinney, deceased and that the same was properly and legally executed, and is entitled to be, and is, hereby admitted to probate.

That a certificate of probate thereof be granted, and that the said last will and testament, together with said certificate, be duly entered of record in the record of wills in this Court, as provided by law, and that the said Nellie Phinney be, and she is hereby, appointed executrix of said estate without bonds, and that the same forthwith vest in her as provided by law and the terms of said last will and testament, to be managed and settled by her without the intervention of the Court, as provided in said last will and testament.

Done in open Court this 19th day of September, 1893.

J. W. LANGLEY,

Judge of said Superior Court of King County, State of Washington."

[Endorsed]: "No. 1814. Superior Court, King County Probate Department. Estate of Guy C. Phinney, de

ceased. Decree admitting will to probate. Filed Sep. 19 1893. T. W. Gordon, Clerk. V. 402."

"*In the Superior Court of King County, State of Washington.*

State of Washington, } ss.
County of Pierce. }

In the matter of the estate of Guy C. Phinney, deceased No. 1814.

I, T. W. Gordon, county clerk of King county, and ex officio clerk of the Superior Court of said county,do hereby certify that I have compared the foregoing copy with the original will, certificate of probate of will, and decree admitting will to probate in the above-entitled estate as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Superior Court at my office in Seattle this 24th day of July, 1895.

[Seal.] T. W. GORDON, Clerk.

By S. N. Peterson, Deputy Clerk."

[Endorsements]: "In the Superior Court of King County, Washington. No. 1814. In the matter of the estate of Guy C. Phinney, deceased. Plaintiff's Exhibit 'B'. Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres Clerk. By R. M. Hopkins, Deputy."

MRS. NELLIE PHINNEY, plaintiff, being first duly sworn, testified as follows:

Q. (By *Mr. Warburton*). Mrs. Phinney, you are the party named in the last will and testament as executrix?

A. Yes, sir.

Q. You may state your residence and citizenship.

A. Seattle.

Q. State of Washington. A. Washington.

Q. A citizen of the State of Washington?

A. I am.

Q. Did you ever mail a letter to the Mutual Life Insurance Company of New York, as executrix?

A. I did.

Mr. Warburton. I have given the defendant notice to produce a letter written by Mrs.Phinney to the defendant, dated July 11th, 1894, and I now ask if they have got that in court, so that we may offer it?

Q. How long have you been a citizen of the State of Washington? A. Twenty-one years.

Mr. Gilman. I have no objection to this paper being used as a copy and admitted.

Q. I hand you this paper and ask you if you can identify that as a copy of this letter? A. I do, Mr. Warburton.

Plaintiff offers in evidence paper identified by the witness.

Paper admitted without objection, and marked Plaintiff's Exhibit "C."

Exhibit "C."

"Seattle, Wash'n, July 11th, 1894.

The Mutual Life Insurance Co. of New York.

Gentlemen: In Sept. 24, 1890, my husband, Guy C. Phinney, took out a policy No. 422198 in your company in the sum of one hundred thousand dollars. He died in this

city last Sept. 12, 1893. Not being familiar with his affairs, and the policy being mislaid, I was not aware that he held such a policy until a few days ago, when the matter was brought to my attention. You will please consider this a notice of his death and a request for payment of the policy. If there are any other preliminaries required before you will pay the same, or anything further you require me to do, advise me at once, and I will be ready to comply therewith. I am the executrix of his estate.

Yours sincerely,

NELLIE PHINNEY,

Executrix of the Estate of Guy C. Phinney."

[Endorsed]: "Plaintiff's Exhibit 'C.' Filed July 25 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk By R. M. Hopkins, Deputy."

Q. Did you mail that to the Mutual Life Insurance Company in New York? A. I did.

Q. Did you ever receive any response to that letter?

A. I did.

Q. I hand you letter and ask you to identify it.

A. This is the letter.

Q. You received that in response to this letter? (Exhibit C.) A. Yes, sir.

Plaintiff offers in evidence paper last identified by the witness. Received without objection, and marked Plaintiff's Exhibit "D."

New York, July 19th, 1894.

Mrs. Nellie Phinney, 1201 James Street, Seattle, Washington,

Madam: Acknowledging receipt of your of the 12th

inst., we beg to advise you that policy 422198 on the life of the late Guy C. Phinney was issued September 24th, 1890, and was forfeited September, 1891, for non-payment of premium. This policy, therefore, has no value. If you desire any further information regarding this insurance we respectfully suggest that you should communicate with our general agent, Mr. A. B. Forbes, San Francisco, Cal., through whose agency this policy was issued.

Very truly yours,

N. E. DUNCAN, JR.,

Corresponding Secretary.

[Endorsed]: "Plaintiff's Exhibit 'D.' Filed July 25 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk By R. M. Hopkins, Deputy."

Q. Did you ever receive any letter from one Mr. Pond of this city? I will hand you this letter and ask you to identify it.

A. Yes, I received such a letter.

Q. Who was he? Do you know what relation he held if any, to the Mutual Life Insurance Company of New York? A. I understood he was agent here.

Plaintiff offers paper identified by witness in evidence.

Received without objection and marked Plaintiff's Exhibit "E."

Exhibit "E."

"Seattle, Wash., July 24th, 1894.

Mrs. Guy C. Phinney, City,

Dear Madam: We beg to advise you that but one pre

mium was paid under your husband's policy 422198 for $100,000, and therefore the policy lapsed in Sept., 1891. Our senior, Mr. Pond, is in Portland, and upon his return will probably take the first opportunity to call upon you and explain his information in detail.

Yours, very truly,

WM. S. POND, Manager.

Per Geo. R. Carter."

[Endorsed]: "Plaintiff's Exhibit 'E.' Filed July 25, 1895, in U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did Mr. Pond ever call upon you, Mrs. Phinney?

A. He did.

Q. State what conversation occurred.

A. He simply stated that one premium was paid, and that the policy was considered lapsed.

Q. Speak louder.

A. He told me that there had been but one premium paid, and that the policy was considered lapsed; that is about all.

Q. Mrs. Phinney, did you understand, or what was your understanding after receiving these letters with reference to the payment of the policy by the company,

Objected to by counsel for defendant for the reason it is for the Court to determine the import of the letters.

Objection sustained by the Court.

Q. I hand you a paper, Mrs. Phinney, and ask you to identify it.

Mr. Warburton.—Have you the original proofs of death here?

Mr. Gilman—No sir. These papers were mislaid in Mr Short's office, and we have not been able to get them.

Q. Did you make an affidavit similar to that—or is this a copy of the affidavit you made?

A. This is a copy.

Q. Do you recognize this as Mr. Grass' signature?

A. Yes, sir.

Q. Mr. Grass made a like affidavit?

A. Yes, sir; he did.

Q. What did you do with the original of this copy?

A. I handed the original to Mr. Young.

Q. Was ever the first letter or the affidavit returned to you, Mrs. Phinney? A. No; I think not.

Paper marked Plaintiff's Identification "F." Also register receipts 5418 as Plaintiff's Identifications "G" and "H."

Q. Did you ever receive a reply to the affidavits you mailed to New York? (Showing paper to witness.)

A. Yes, sir; I recognize this letter.

Q. Is that in reply to the affidavit? A. Yes, sir

Q. Did these replies that you have spoken of, this and the other letters, come in the ordinary course of mail?

A. Yes, sir.

Plaintiff offers letter identified by the witness, and envelope in evidence. Admitted without objection, and marked respectively Plaintiff's Exhibits "I" and "J."

[redacted]

Exhibit "I."

"Return to the Mutual Life Insurance Co. of New York Nassau, Cedar and Liberty streets, New York, N. Y., if

not delivered within 5 days. New York, N. Y., Sept. 4 5:30 P. M., 1894. Mrs. Nellie Phinney, Seattle, Wash."

[Endorsed]: "Plaintiff's Exhibit 'I.' Filed July 25 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk By R. M. Hopkins, Deputy."

Exhibit "J."

New York, Sept. 4, 1894.

Mrs. Nellie Phinney, Seattle, Wash.,

Dear Madam: We beg to acknowledge receipt of your favor of July inst., enclosing affidavit in re 422188.

We shall give the matter early attention.

Very truly yours,

H. E. DUNCAN, JR.,

Cor. Sec.

"Law Dept. It will require not less than ten days before a reply may be expected in answer to your request."

[Endorsed]: "Plaintiff's Exhibit 'J.' Filed July 25. 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Mr. Warburton.—With reference to the pleadings, your Honor, that the answer admits that this policy set out in the complaint is an exact copy. They have so admitted in open court, and I would like to have it in the record as an admission that it is an exact copy. There is a little question in the reply—it is worded rather peculiarly, and I would like to know whether it is admitted.

Mr. Gilman.—The pleadings are before the Court, and I suppose we are bound by all the admissions contained in

them. As I understand, you plead a policy by copy. That paragraph of your complaint is not denied. We are willing to stand upon the record we have made.

Mr. Warburton.—That is all I care to know.

Q. The policy has not been paid, Mrs. Phinney?

A. No.

Cross-Examination.

Q. (By Mr. Gilman.) Mrs. Phinney, this letter of July 11, 1894, was the first communication that you made to the company concerning the policy of your husband?

A. It was.

Q. How long before that had you learned that he had such a policy?

A. Well, I had always understood—a long time, that Mr. Phinney had this policy.

Q. You had understood for a long time that he had held such a policy?

A. That he held such a policy.

Q. Why, then, did you state in your letter this: "I was not aware that he held such a policy until a few days ago, when the matter was brought to my attention"?

A. I do not remember.

Q. Is it a fact, as stated in that letter to the company that you were not aware that he held such policy until a few days ago, when it was brought to your attention—just refresh your memory and see if it had not been brought to your attention just a few days before it was written.

A. No; I had always known that he carried a policy I don't know that I knew just the name of the company ex

actly, but always understood that he carried a hundred thousand dollar policy.

Q. From whom did you gather the information that you speak of in that letter?

A. The first party I spoke of it, I think, was to Mr Higgins, of Victoria.

Q. Do you know where Mr. Higgins got his informa tion? A. I do not.

Q. You knew at the time that Mr. Phinney died that he had a hundred thousand dollar policy of insurance?

A. I did.

Q. That was alive? A. I did.

Q. Why then in your petition for letters testamentary to the Superior Court of this county did you state that his estate amounted to only fifty thousand dollars?

A. I do not remember just now.

Q. Now, as a matter of fact, Mrs. Phinney, did not Mr Phinney, before his death tell you that he had given up this hundred thousand dollar policy?

A. He did not.

Q. Can you give any explanation, then, why you put his estate at fifty thousand dollars?

A. No, I cannot. I don't know that I did.

Q. You knew then before his death that he held a hun dred thousand dollarpolicy in the Mutual Life?

A. I did.

Q. You knew that fact? A. Yes, sir.

Q. He told you that fact? A. He did.

Q. Why did you wait nine months before you wrote the Mutual Life in reference to that policy?

A. Well, I was very ill for a number of months after Mr. Phinney's death.

Q. Mrs. Phinney, Mr. Phinney had other life insurance? A. He did.

Q. How long after his death did you wait before you put in a claim for that insurance?

A. I could not tell you just how long. I do not remember.

Q. Did you put in a claim on the other insurance within a month after his death? A. Yes, sir.

Q. And yet knowing that he held this hundred thousand dollar policy in the Mutual Life you waited nine months before making the claim?

A. The policy could not be found.

Q. You never did find it, did you. A. No.

Q. You haven't it now, have you? A. No.

Q. You did not have it when you finally did make the claim. A. No.

Q. Why didn't you write the company before and ask them to pay it instead of waiting nine months before doing it?

A. I was too ill at the time to attend to it.

Q. You were not too ill to collect your other policies? You had an attorney, didn't you, who was managing this matter for you, Mr. Burleigh? A. I did.

Q. Did you ever tell Mr. Burleigh that that hundred thousand dollar policy was in existence?

A. I think I did.

Q. He took no steps to collect it?

A. I don't know that he did.

Q. You don't know that Mr. Burleigh took no steps to

collect the hundred thousand dollars belonging to you, al though you told him about it? A. Yes, sir.

Q. Is it not a fact you didn't know anything about this policy until Mr. Warburton came over from Tacoma and told you about it? A. No, sir.

Q. Had not you had consultation with Mr. Warburton before you ever sent that letter. A. Yes, sir.

Q. And did not Mr. Warburton tell you that he had another case—same kind of a case?

A. I think he did.

Q. And it was not until after Mr. Warburton told you that that you ever thought of putting in any claim on this policy? Is not that the fact, Mrs. Phinney?

A. No, sir.

Q. But it was after Mr. Warburton told you that you did put in a claim on the policy? A. Yes, sir.

Q. Mr. Burleigh drew this petition for letters testamentary, didn't he? A. I think he did.

Q. Did you tell him at that time what property Mr Phinney owned. A. I do not remember.

Q. Did you tell him about that hundred thousand dollar policy at that time. A. I think I did.

Q. You swore to this petition, and swore that the estate was fifty thousand dollars?

A. I do not remember.

Q. Where did you find Mr. Phinney's policies of life insurance at the time of his death?

A. I did not find them myself.

Q. Did you ever make any search for this policy?

A. Search has been made—not by me.

Q. You did not make any search personally?

A. No, sir.

Redirect Examination.

Q. (By Mr. Warburton.) You say that Mr. Phinney never told you this policy was forfeited? A. No.

Q. Did he ever tell you it was alive? A. Yes.

Q. How many times did he tell you it was alive?

A. I could not tell you just how many times, but a number of times.

Q. How long prior to his death did he mention this policy as being one of his policies of insurance that was in force? A. Not more than two weeks.

Q. Did he give you any directions as to the use of the insurance you should collect? A. Yes, sir.

Q. Mention this policy among them?

A. Yes, sir.

Q. You say you did have several conversations with Mr. Burleigh about this?

A. Well, I don't know several—I know I have talked with Mr. Burleigh.

Q. Did you talk to others about it? A. No.

Q. State the condition of your health, Mrs. Phinney immediately after the death of your husband.

Objected to by counsel for defendant as immaterial.

Objection overruled; exception allowed.

Q. For the first nine months after Mr. Phinney's death?

A. The first year after Mr. Phinney's death I was seriously ill.

Q. Were you able to attend to business at all during that time? A. No, I was not.

Q. These policies were collected by your agents, were they not? A. Yes, sir.

Q. The business matters were all turned over to other parties? A. All done through other parties.

Q. Who prepared that letter, Mrs. Phinney, that you mailed to New York?

Objected to by counsel for defendant as immaterial.

Objection sustained.

Recross-examination.

Q. (By Mr. Gilman.) Mr. Phinney, shortly before his death, told you all about his affairs.

A. He told me a great deal about them.

Q. You got pretty familiar with them, did you?

A. No, I did not.

Q. Told you about this policy, you recollect that, particularly?

A. Yes; he told me what insurance he had.

Q. And you were fully aware at the time of his death that he held this policy which is sued on in this action?

A. I thought he had this policy.

Q. Well, did not you know; he told you that?

A. Yes, he told me that.

Q. You were fully aware of that fact?

A. Yes, sir.

Q. What other policy did Phinney tell you he had?

A. He did not name the policies, but he told me the amount of the insurance.

Q. Did not you state, on your former examination that he told you particularly about this policy that he had

in the Mutual Life for a hundred thousand dollars?

A. Yes.

Q. But he did not tell you the names of the other companies in which he held insurance?

A. If he did, I do not remember.

Q. But you do remember this particularly?

A. Yes; I remember now.

Q. How long after Mr. Phinney's death before you filed claims on the policies in the New York Life?

A. I cannot tell you the date, it was within a month.

Q. And he had ten thousand in another company, did he not? A. Yes, sir.

Q. You filed a claim against that company within a month? A. Yes, sir.

Q. The state of your health did not in any way prevent you filing claims against the other companies?

A. It was done by the agents.

Q. You had Mr. Young as your agent and Mr. Burleigh for your attorney?

A. Mr. Burleigh was not an agent at that time.

Q. When did he become an agent—Mr. Young, I mean? A. Not until October, 1893.

Q. Who was your agent prior to that?

A. Mr. Brenton. (Testimony of witness closed.)

DOUGLAS YOUNG, a witness called on behalf of the plaintiff, being first duly sworn, on oath testifies as follows:

Q. (By Mr. Warburton.) What is your residence and occupation? A. Seattle, Washington. Agent of the Phinney estate.

Q. How long have you been such.

A. Since January 1st, 1894.

Q. I hand you copies of two affidavits, and ask you if you ever saw the originals? A. I did; yes, sir.

(Identification F, referred to.)

Q. What did you do with that, if anything?

A. I wrote these affidavits, and had Mrs. Phinney execute the first and had W. W. Grass execute the second affidavit, and then mailed them by registered letter to office address of the Mutual Life Insurance Company of New York.

Q. Did you receive these receipts? (Identification G and H shown witness.)

A. Yes, sir, I received this receipt in the postoffice (H) at Seattle, and this receipt (G) from the Mutual Life Insurance Company of New York through the mail.

Q. Properly addressed and postage prepaid?

A. Yes, sir.

Cross-examination.

Q. (By Mr. Gilman.) When did you first become agent of Mrs. Phinney?

A. January 1st, 1894. My work dated from October 1, 1893. (Testimony of witness closed.)

Mr. Warburton.—I offer in evidence plaintiff's identification "F," "G" and "H."

Papers received without objection and marked plaintiff's Exhibits "F," "G," "H."

EXHIBIT "F."

State of Washington, } ss.
County of King. }

Nellie Phinney, being first duly sworn, on her oath, deposes and says that she is a resident of the city of Seattle

State of Washington. That in the month of May, 1893 affiant was married to one Guy C. Phinney, who was then a resident of Seattle, Washington, and who continued to be a resident of said city and State up to the time of his death, and said affiant continued to be the lawful wedded wife of said Guy C. Phinney up to the time of his death That on or about the 24th day of September, 1890, the Mutual Life Insurance Co. of New York insured the life of said Guy C. Phinney, in the sum of one hundred thousand dollars. That on the 12th day of September, 1893, said Guy C. Phinney died in the city of Seattle, State of Washington. That said affiant is executrix of the estate of Guy C. Phinney.

NELLIE PHINNEY.

Subscribed and sworn to before me this 9th day of Aug., 1894.

T. W. GORDON,

County Clerk and Ex-officio Clerk of the Superior Court.

State of Washington, } ss.
County of King. }

W. W. Grass, being first duly sworn, on his oath, deposes and says that he is a resident of the city of Seattle, Washington, and has been for the past five years, that for several years prior to the death of Guy C. Phinney he was well acquainted with him; that said Guy C. Phinney was the husband of one Nellie Phinney, whose name is subscribed to the foregoing affidavit.

That on the 12th day of September, 1893, said Guy C. Phinney died in the city of Seattle, State of Washington. That affiant saw his dead body on and after said 12th day

of September, 1893, and on the 15th day of September, 1893, saw his dead body lowered into the grave.

W. W. GRASS.

Subscribed and sworn to before me this 28th day of Aug., 1894.

[Seal] T. W. GORDON.

[Endorsements]: "Plaintiff's Exhibit 'F.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

EXHIBIT "G."

"Registry return receipt. Sent Aug. 28, 1894.

Reg. No. 5418. From Post Office at Seattle, Wash.

Reg. letter.

Reg. parcel. Addressed to Mut. Life Ins. Co.

Post Office at New York, N. Y.

After obtaining receipt below, the postmaster will mail this card, without cover and without postage, to address on the other side.

Received the above described registered letter. 20300

(Sender's name on other side. parcel.

Sign on dotted line to the right. When delivery is made to other than addressee, the name of both addressee and recipient must appear.

MUT. LIFE INS. CO., M.R. Hibbard

Erase letter or parcel, according to which is sent." (on other side)

"When the registered letter or parcel accompanying this card is delivered, the postmaster will require signa-

ture to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $300 is fixed by law for using this card for other than official business.

New York
Postoffice Department. Sept. 4.
Official Business. Postoffice at 4 30 P. M.
94.

Return to

Name of sender, Douglass Young,
Street and number Agent.

Or. Post Office, Post office at Seattle, county of King, State of Washington.

[Endorsements]: "Plaintiff's Exhibit 'G,' filed July 25, 1895, in the U. S. Circuit Court, A. Reeves Ayres, Clerk, by R. M. Hopkins, Deputy."

EXHIBIT "H."

Registered (Letter) No. 5418, P. O., Seattle, Wash.
(Parcel)

Received Aug. 28, 1894, of Douglas Young, Agt., a (letter) addressed to Mut. Life Ins. Co. of N. Y., New York. N. (parcel).

G. DAVIES, P. M., Per T.

[Endorsed]: "Plaintiff's Exhibit 'H.' Filed July 26, 1895. A. Reeves Ayres, Clerk, R. M. Hopkins, Deputy."

Mr. Warburton. That is all, in chief.

At 12 o'clock, M., further hearing continued until 2 o'clock P. M., after the Court cautioned the jury as to their conduct during the recess and trial of the cause.

Afternoon session. Continuation of proceedings pursuant to adjournment at 2 o'clock.

Mr. Strudwick. If your Honor please, we desire to submit in behalf of the defendant at this stage of this case, a motion for a nonsuit. We base this motion on two grounds:

First. That the plaintiff has failed to establish the material allegation in her complaint that Phinney in his lifetime performed all the conditions of this contract, as to which there is an issue, and if waiver could be introduced there is no proof of waiver.

Second. It is alleged in the complaint, and denied in the answer, that Mrs. Phinney, the plaintiff, has performed all the conditions of this contract. We claim that no right of action accrued against this defendant until she had tendered the amounts which according to the contract were due for the two unpaid premiums.

Motion for nonsuit denied; exception allowed to defendant.

Mrs. Nellie Phinney recalled for cross-examination.

Q. (By *Mr. Gilman.*) Mrs. Phinney, the fifty thousand dollars on your husband's life was payable to yourself?

A. It was.

Q. And the ten thousand dollars was payable to the children? A. To the children.

Q. Neither one of these policies belonged to the estate? A. No, sir.

(Testimony of witness closed.)

Defendant's Testimony.

ANDREW B. FORBES, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By *Mr. Gilman.*) Where do you reside?

A. San Francisco.

Q. What is your business, Mr. Forbes?

A. I am an insurance agent and general agent of the Mutual Life Insurance Company of New York.

Q. General agent of the defendant in this action?

A. Yes, sir.

Q. For what territory?

A. At this time for California, Nevada, and the Sandwich Islands since the first of January last.

Q. During the years 1890-1891-2-3, what territory did your agency compromise?

A. It comprised Arizona as well as California, Nevada, Oregon, Washington, and Idaho, Montana, and British Columbia.

Q. Washington and Oregon were included in that territory? A. They were.

Q. You were the head of the company's business in the territory that you have mentioned?

A. Yes, sir.

Q. Did you divide this agency into subagencies?

A. I did.

Q. In what subagency was Washington?

A. Washington was under the control of F. L. Stinson, combining Oregon and Washington together.

Q. Was there any written agreement defining Mr. Stinson's authority?

A. I think that Mr. Stinson had printed instructions.

Q. Do you know whether or not he also held an appointment from the company itself.

A. He did.

Q. What was Stinson's designation as agent of the company?

A. He was State general agent for Washington and Oregon.

Q. Now, your authority, as I understand it, emanated directly from the company? A. It did.

Q. Did you have authority from the company to appoint subagents?

A. Of course, it was my province to have that.

Q. Who had charge and management of the affairs of the Mutual Life Insurance Company in the State of Washington during the years 1890, 1891-2-3?

A. Mr. Stinson.

Q. Now, do you know of a certain policy which is sued on in this action, No. 422198, for one hundred thousand dollars on the life of G. C. Phinney?

A. Yes, sir.

Q. Was there an application made by Phinney for that policy? A. There was.

Q. Will you state, if you please, th course that the application took?

A. The application was forwarded by Mr. Stinson to my agency, where he returned all these things, and then it was forwarded by me to the company in New York.

Q. Now, was a policy issued upon that application?

A. There was a policy issued upon the application.

Q. What course did the policy take?

A. The policy was sent out to me, and was forwarded to Mr. Stinson.

Q. Here at Seattle?

A. At Seattle for delivery.

Q. Do you know how many premiums were paid on this policy?

A. Only one. That was the first premium.

Cross-Examination.

Q. (By *Mr. Warburton.*) Mr. Forbes, you are the party whose deposition was taken some time ago in San Francisco? A. Yes, sir.

Q. You say that Mr. Stinson received no direct appointment from the company?

A. He did receive an appointment direct from the company.

Q. Who gave him that appointment—who signed that appointment?

A. It was signed by the officers of the company.

Q. McCurdy?

A. I do not know whether McCurdy or not. I think it was the secretary.

Mr. Strudwick. It was signed by Lloyd, second vice-president.

Mr. Warburton. It was one of the executive officers of the company.

Q. What authority did Mr. Stinson have as agent?

A. Well, he had powers under that to accept service

of suit. He had powers as subagent and State general agent to receive applications. To receive premiums, receipts, and payments on them, and report them to me.

Q. That was his full limit of authority, was it?

A. It was his authority.

Q. Didn't have anything in excess of that?

A. Well, that embraces most all there is connected with the business. In that would be involved all the necessary minor details of the business that would come up just the same as if he were acting for myself or for the company.

Q. You say that his authority is in writing—this is the appointment that you have referred to?

A. Yes, sir.

Defendant's counsel moves to strike out the testimony of the witness in reference to the powers of Mr. Stinson, except as designated in this written instrument.

Motion denied. Exception allowed.

(Paper identified as Defendant's Exhibit 1.)

Q. This was all the authority he had from the company, except through you?

A. Yes, sir; except through me.

Q. You say that he had authority in addition to accepting applications and accepting premiums?

A. Yes, sir.

Q. He did have additional authority?

A. Yes, sir.

Q. I will ask you, Mr. Forbes, if in the deposition that you have already sworn to, if the following question was not asked you, "What relation, if any, existed between F. L. St'nson, of Seattle, Washington, and the said Mu-

tual Life Insurance Company of New York?" and I will ask you if you did not make the following reply thereto: "He had authority to solicit life insurance for the Mutual Life Insurance Company of New York; to collect premiums, but not to extend time for payment of premiums; and to report and remit the same to me at the general agency. He was appointed by me, but had no written authority, as I recollect." This is all true, is it?

A. Not from myself.

Q. "I have not been able to find any written appointment or copy of the same." A. Yes, sir.

Redirect Examination.

Q. (By *Mr. Gilman.*) Mr. Forbes, who generally had charge of all the business of the company in the State of Washington durin the period that I have mentioned? A. Mr. Stinson.

Q. Did you have authority to appoint such an agent from the company?

A. Yes, sir; I think my powers registered would some how. The company understood all my appointments, and were acquainted with all my appointments of that kind.

Q. The appointment of Stinson was reported to the head office? A. It was.

Q. Ratified by them? A. It was.

Q. Did they know of his appointment?

A. Oh, yes.

Q. As I understand you, so far as concerns the business of life insurance of this company in this State, he had charge of it? A. He did.

Recross-Examination.

Q. (By Mr. Warburton.) You say only one payment of premium was made? A. Only one premium.

Q. How do you know that?

A. That was reported to me.

Q. You don't know anything about it except that it was not paid to you? A. That is all.

Q. Mr. Stinson had power to receive premiums, did he not?

A. Oh, yes; he had power to receive them, but it was his duty to report them.

Q. It may have been his duty, but he might have accepted them and not reported it. A. Possibly.

Q. Then you know nothing about it except what he told you? A. Yes, sir.

Q. You say the company was advised of Stinson's appointment? A. Yes, sir.

Q. The company knew all about it?

A. Of course they did. I think in New York I had my first conversation with Stinson, and appointed him there.

Q. Was McCurdy there at that time?

A. McCurdy was not there.

Q. Was Easton around about that time?

A. No.

Q. Easton didn't know anything about it?

A. I don't know whether he did or not. Easton was not the person that I dealt with; I dealt with Lloyd.

Q. He was secretary as early as 1888?

A. I think so.

Q. McCurdy was president as early as 1888?

A. Yes, sir.

Q. And Duncan was corresponding secretary; he ought to know about it?

A. I do not think Duncan was in the service as corresponding secretary at that time.

Q. Even earlier than 1890, was he not?

A. He might be.

Q. That was at the time the policy was issued?

A. I am speaking of the time that I appointed Mr. Stinson in New York.

Redirect Examination.

Q. (By Mr. Gilman.) Mr. Forbes, I suppose the business of the Mutual Life is divided into different departments?

A. Yes, sir.

Q. Mr. McCurdy don't have the superintending of the agency, does he? A. Not at all.

Q. Who is that done by?

A. Generally done by the second vice-president and general manager.

Q. I wish you would state to the jury, Mr. Forbes, the general course of the business of the collection of premiums of the Mutual Life at that time?

A. We have sent us the renewal receipts from New York. They are sent in advance, so that we can record them and forward to the different agencies. These premiums are due on the day as stated, and if they are not paid, we receive no statement from them; we note it on our book. Then we write to the subagency, like Mr. Stinson or Mr. Wheaton in Montana, and notify them to re-

turn these renewal receipts to us, and when they come back we forward them to New York, and we note on our account that they are not paid.

Q. Now, was the renewal receipt for Phinney's second year's premium—that is, the premium of 1891—sent from New York to you? A. It was.

Q. What did you do with it?

A. I forwarded it to Mr. Stinson.

Q. What became of it then, if you know?

A. Mr. Stinson's account came down and it was unpaid, and not reported as paid, and we wrote up as usual to have these receipts returned, and he returned that receipt to us with others.

Q. The Phinney receipt was returned?

A. The Phinney receipt was returned.

Q. What is done by the agent with the receipt if the premium is paid?

A. He gives it to the person who pays the premium.

Q. This receipt was returned to you?

A. This receipt was returned to me.

Q. And you returned it to New York?

A. I forwarded it to New York.

Recross Examination.

Q. By Mr. Warburton.—Was the report of this premium being unpaid and the return of this receipt accompanied by a letter?

A. I think all our reports are with a statement that goes to each department.

Q. Have you got that letter here?

A. I have not. It is merely forwarded to us among premium receipts in a printed form and returned.

Q. Have you got the letter returning the premium receipt? A. It was returned with many others.

Defendant's counsel produces letter dated November 26.

Q. I show you this letter.

A. This is the letter from Mr. Stinson.

Q. This is Stinson's signature?

A. This is Stinson's signature.

Paper marked Plaintiff's Exhibit "K" for identification.)

Q. What is this paper?

A. This is a communication from F. L. Stinson.

(Paper marked Plaintiff's Exhibit "K" for identification.)

Q. You say a letter of Stinson's came with the application? A. Yes, sir.

Q. Was there a policy issued on that application?

A. Yes, sir.

Q. Was it issued on the plan asked for in that application? A. No, sir.

Q. How did it come it was not issued on the plan asked for? A. Well, we received—

Objected to by defendant's counsel as immaterial. Objection sustained on the ground it is not proper cross-examination.

(Testimony of witness closed.)

F. L. STINSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Defendant offers in evidence certified copy of the appointment of M. L. Stinson as agent of the defendant in this action from the office of Secretary of State of this State, under the great seal of the State, which has been heretofore identified as defendant's Exhibit "1."

Paper admitted in evidence without objection, and marked defendant's Exhibit "1."

DEFENDANT'S EXHIBIT "1."

"United States of America. State of Washington. Office of the Secretary of State.

I, J. H. Price, Secretary of State of the State of Washington, and ex-officio insurance commissioner, do hereby certify that I have carefully compared the annexed copy of the appointment of Fred L. Stinson, agent for the Mutual Life Insurance Company of New York, with the original now on file in this office, and find the same to be a true and perfect copy thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State of Washington. Done at Olympia, this 23d day of July, in the year of our Lord one thousand eight hundred and ninety-five.

J. H. PRICE,
Secretary of State and Ins. Com.

(The seal of the State of Washington, 1889.)

"Know all men by these presents, that pursuant to the requirements of section 10 of the Insurance Law of the State of Washington, The Mutual Life Insurance Company of New York, a corporation formed under the laws of the State of New York, and carrying on the business of life insurance in the State of Washington, has constituted

and appointed, and by these presents does constitute and appoint, Fred L. Stinson, of Seattle, its general agent in said State of Washington.

That said Fred L. Stinson, so appointed as aforesaid, is the principal agent or chief manager of the business of the said The Mutual Life Insurance Company of New York, in said State of Washington, on whom summons and other process may be served in any action or other legal proceeding against said corporation.

And the said The Mutual Life Insurance Company of New York hereby stipulates and agrees that in consideration of the permission granted by the State of Washington to said The Mutual Life Insurance Company of New York to transact insurance business in said State, that if at any time said company shall be without an agent in the State of Washington, on whom summons or other legal process may be served, service of said summons or other legal process may be made upon the insurance commissioner, such service upon the commissioner to have the same force and effect as if made upon said company.

In witness whereof, the said company has to these presents affixed its corporate seal, and caused the same to be subscribed and attested by its 2d vice-president and secretary, at New York City, State of New York, on the 16th day of April, A. D. 1891.

ISAAC F. LLOYD, 2d Vice-President.

W. J .EASTON, Secretary.

[Corporate Seal]

State of New York,
City and County of New York. } ss.

On this sixteenth day of April, A. D. 1891, before me, the subscriber, a commissioner duly appointed to take proof and acknowledgment of deeds and other instruments, came Isaac F. Lloyd, 2d vicepresident, and W. J. Easton, secretary of the Mutual Life Insurance Company of New York, to me personally known to be the individuals described in and who executed the preceding instrument; and they duly acknowledged the execution of the same; and being by me each duly sworn, severally and each for himself, deposes and says that they are the said officers of the insurance company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of the said company; and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation as and for the act and deed of said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal at New York City on the day and year first above written.

[Commissioner's Seal] CHARLES NETTLETON
Commissioner for Washington in New York.

[Endorsed]: The Mutual Life Insurance Company of New York to Fred L. Stinson. Appointment of agent. Approved as to form, William G. Davies. Filed May 7, 1891. Allen Wier, Ins. Comr.

[Endorsed]: "Defendant's Exhibit 1. Filed July 25,

1895, in the U. S. Circuit Court. A. Reeves Ayres. By R. M. Hopkins, Deputy.

Q. By Mr. Gilman.—Where do you reside?

A. Seattle, Washington.

Q. And in what business are you engaged?

A. Engaged in the life insurance business.

Q. For what company?

A. The Manhattan Life.

Q. Did you at any time ever have any relations with this defendant? A. I have; yes, sir.

Q. During what period?

A. From 1889 and till the latter part of 1893.

Q. Now, what was your relation with the defendant during that period—if you had any different relations during the different parts of the period, state so.

A. For a year I was acting as special agent for Mr. Forbes. Then I was appointed State agent for Washington and Oregon.

Q. That appointment was made at the time this power was filed?

A. At or about that time; yes, sir.

Q. That was the 16th day of April, 1891. During the period from 1889 to the latter part of 1893, who had charge and management of the business of this defendant in the State of Washington? A. I did.

Q. Did they have any other representative here except such as held under you? A. No, sir.

Q. Did you know Guy C. Phinney in his lifetime?

A. I did.

Q. As agent of the defendant, did you have any trans-

action with him in reference to issuing a policy of insurance on his life? A. I did.

Q. When was that?

A. That was in September, 1890.

Q. Now, you may state what occurred between you.

A. I solicited Phinney for insurance and finally wrote his application for one hundred thousand dollars. I think it was September 22nd that I wrote the application, and he was examined I think the next day. The application and the examination was forwarded to Mr. Forbes at San Francisco, and in due course I received the policy.

Q. From what source did you receive the policy?

A. From San Francisco, Mr. Forbes.

Q. Was that the general course that all your applications and policies took, namely, from yourself to Mr. Forbes in San Francisco and from Mr. Forbes to the company in New York, and returned from New York to San Francisco, and San Francisco to you?

A. Yes, sir, in all cases.

Q. And where do you state this application was written?

A. At Mr. Phinney's office, I think, at Seattle.

Q. Upon the return of the policy was it delivered to Mr. Phinney? A. Yes, sir.

Q. By whom? A. By myself.

Q. Where? A. I am very sure at his office.

Q. That was in Seattle?

A. Seattle, Washington.

Q. Did Mr. Phinney pay you the first year's premium?

A. He did.

Q. Where was that premium paid?

A. Well, he settled for it at his office—it was paid at different places.

Q. The premium was not all paid at one time?

A. No, sir.

Q. But all the payments that were made were made in Seattle? A. Yes, sir.

Q. Now, what was the course of business of the company at that time in reference to the collection of renewals upon policies, that is, second and subsequent—that is, the premiums of second and subsequent years?

A. I received a monthly statement from Mr. Forbes inclosing the renewal receipts due that month. They were forwarded to me and by me collected, and the proceeds remitted to Mr. Forbes.

Q. What was done with the renewal receipts when the premium was collected?

A. They were given to the insured.

Q. And in case of their not being collected?

A. Returned to Mr. Forbes.

Q. Now, the second premium of Mr. Phinney became due September 24, 1891. State whether or not you sent out notices to the different policy holders.

A. Yes, sir.

Q. Was any other notice sent out?

A. Mr. Forbes sent a notice from San Francisco as well.

Q. Now, in the case of Mr. Phinney, was such notice sent by you, that is, before the second year's premium matured?

A. I presume it was. I sent them to all the policy holders.

Q. What did Phinney do in response to that notice, if anything?

A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company, and asked me if I could not take his notes for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company, and they would take only cash. I think a few days before it was due, perhaps three or four days. I met him again and we had a similar conversation, and I told him about the same again, that I was unable to carry his notes; that I did not have the cash to put up to the company.

Q. Did he ever make payment of that premium to you? A. Not to me; no, sir.

Q. Who else in this State was authorized to receive and collect premiums? A. No one.

Q. Now, did the time limited for the payment of premium—that expired without the payment of the premium, I understand.

Objected to by plaintiff's counsel as calling for a conclusion.

The Court. That is an unimportant question.

Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due and was unpaid, with reference to this particular premium?

A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten days, I should say—between one and two weeks after it was due—he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it, and he then told me that he was prepared to pay the premium.

Q. What did he ask you to do?

Objected to as leading by plaintiff's counsel.

Q. What, if anything, did he ask you to do?

Objection overruled; exception allowed.

A. He told me if I would bring the renewal receipts, or words to that effect, that he would pay the premium.

Q. State what occurred between you—what you said to him and what he said to you.

A. I told him that I could not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank. I am not positive about that. He told me that he did not think that he could pass for a certificate of health, from the fact that he had been rejected by the Equitable a few days before.

Q. Now, were any steps taken by you, or by Mr. Phinney, to your knowledge, to ascertain whether or not he could obtain a certificate of health?

A. I saw Dr. Eagleson, the company's medical examiner and requested him to examine Mr. Phinney and furnish a certificate of health. He told me that he had examined him recently for the Equitable, and that they had refused the policy, and it would be useless to try to pass him for the reinstatement.

Q. You had the renewal receipt at that time in your possession? A. Yes, sir.

Q. What was done with that?

A. I returned it to Mr. Forbes.

Q. I will ask you whether or not Mr. Phinney at any time presented you the money for this premium?

A. No; he did not.

Q. Well, was there any further transaction between you and Mr. Phinney with reference to this insurance or the policy?

A. We had, I think, several conversations after that in a general way. I think it was in December, possibly January following, I was in Mr. Phinney's office and we got to talking about insurance, and the subject of his policy came up, and I requested him to let me have the policy to use for canvassing purposes, and he stated the same having lapsed he had no further use for it, and I could take it if I wanted it.

Q. Did you take it?

A. I took it at that time, as near as I can remember.

Q. Do you remember whether or not you did use it for canvassing purposes?

A. I do not remember that particular policy; I had several in large amounts—I don't know whether I used it or not.

Q. I will ask you whether or not it was customary in your business where policies have been lapsed to get the policy?

A. Well, I did it in large policies.

Q. You were still the agent of the company, I think you said, until the latter part of 1893?

A. Yes, sir.

Q. State whether or not the premium of 1892 was paid or tendered? A. Not to me.

Q. Now, until you left the service of the company in the latter part of 1893, I will ask you whether or not any claim was made by Mrs. Phinney to you regarding that policy? A. Not to me.

Q. I will ask you whether or not she or anybody representing her ever made any inquiry regarding it?

A. Not to me.

Q. After you received this policy, this conversation between yourself and Mr. Phinney, I will ask you whether or not Mr. Phinney ever made any claim that this policy was not lapsed? A. No.

Cross-Examination.

Q. (By Mr. Warburton.) When did you say this policy was delivered to Mr. Phinney?

A. Some time in October, 1890.

Q. The 31st of October?

A. Well, I do not recollect the date. It was from four to six weeks after the application was written.

Q. Are there any records in the city whereby you could ascertain the exact date? A. No, sir.

Q. Was it as early as the 28th of October?

A. Well, I can only remember in a general way. It usually took four to six weeks to get these policies, and I would say inside of six weeks.

Q. Maybe I can refresh your memory. You had con-

siderable correspondence with the company with reference to a change from ordinary life to twenty-pay life?

Objected to by defendant's counsel as immaterial.

Objection overruled. Exception allowed.

A. I had some correspondence.

Q. Did you receive a telegram from the company stating this policy had been issued on a certain date?

A. From Mr. Forbes.

Q. What date was that telegram, do you recollect?

A. No.

Q. Did you not on the 21st day of October, 1890, receive the following telegram from Mr. Forbes: "F. L. Stinson, Safe Deposit Building. Heilbron policy issued. Will write Phinney on twenty-year life—Baxter twenty-year endowment. Shall I order policies Phinney and Baxter?"

A. I received a telegram to that effect.

Q. Now, that was on October 21st, was it not?

A. Well, I presume so. I do not remember the exact date.

Q. Now, on October 21st, did you not receive the following letter from A. B. Forbes: "F. L. Stinson, I inclose copy of my telegram to you of this day. It is Co.'s best offer, and I trust we will receive your order for Phinney and Baxter policies. The writer wired home office this P. M. to forward the three policies, and will do our best to deliver the same?"

Objected to by defendant's counsel as immaterial.

Q. It would take about ten days in the ordinary course to get that policy from New York?

A. About ten to twelve days.

Q. It would be here about the first of November?

A. About that.

Q. Is it not your best recollection that the policy was delivered on or about the first day of November?

A. I should consider it would be about that time.

Q. Now, you have said that you saw Mr. Phinney a few days before this policy matured, in 1891—the premiums you claim—and had a talk with him about it, and he said he was anxious for you to take his notes, and you informed him you could not take his notes?

A. Yes, sir.

Q. When was the next time you saw him?

A. Well, I saw him so often that I could not fix any particular date, within a few days.

Q. What did you tell him the next time you saw him?

A. In reply to his answer I told him—

Q. What was the conversation between you and Mr. Phinney the first time you saw him after the premium was due?

A. It was to this effect, that he asked me to take his notes in lieu of cash, and deliver him the company's receipt.

Q. What did you say?

A. I told him I could not accept his notes, as I had to pay cash to the company, and I didn't have it.

Q. You told him it would be necessary to get cash?

A. Yes, sir.

Q. Before you delivered the receipts?

A. Yes, sir.

Q. When was the next time you saw him?

A. Within a week or ten days, I should think.

Q. What was the conversation then?

A. It was about to the same effect as the first.

Q. Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in the general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. Now, just going back, you say finally he told you he was ready to pay the premium? A. Yes, sir.

Q. What did you tell him?

A. I told him that I could not accept the premium without a certificate of health.

Q. That the policy was forfeited?

A. That the policy was forfeited.

Q. Lapsed? A. Lapsed.

Q. And you could not accept it? Now, you wrote the company that he had tendered the premium, didn't you?

A. Yes, sir.

Q. You understand that was a good tender, didn't you? A. Yes, sir.

Defendant moves to strike out the answer of the witness as to what he understood.

Motion sustained.

Q. You understood Phinney was ready to pay—he said so? A. Yes, sir.

Q. You told him you could not accept it, because he was in ill health? A. Yes, sir.

Q. You say later on you went to the office and borrowed this policy? A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect?

A. Words to that effect; yes, sir.

Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours?

A. Yes, sir.

Q. Now, you didn't mean to tell him an untruth?

A. No, sir.

Q. You know now that it was not true, don't you?

A. What?

Q. That the policy was not forfeited, but you thought it was forfeited, but, as a matter of fact, it was not forfeited at that time.

Defendant objects as calling for a conclusion of law.

Objection sustained. Exception allowed.

Q. Well, Phinney permitted you to take the policy?

A. Yes, sir.

Q. Did you ever return it to him?

A. Not to my knowledge. I don't remember that I did.

Q. Are you sure you got it—that he loaned it to you?

A. Yes. I am sure as I could be of anything that happened at that time.

Q. What became of this policy?

A. I don't know.

Q. You haven't got it now. A. No.

Q. You say Phinney let you have this policy for canvassing purposes? A. Yes, sir.

Q. You asked him for it for that purpose?

A. Yes, sir.

Q. Now, you would not care to have a dead policy for canvassing purposes, would you?

A. It would not make any difference whether it was dead or alive.

Q. You would not want to say that Phinney had a policy issued for a hundred thousand, and it was such an expensive contract—

A. That is part I should not state if I was canvassing. I should show the contract.

Q. For the purpose of soliciting you would let them understand it was a live policy? A. Yes, sir.

Q. Now, you are not quite sure the date that Phinney paid you this money?

A. The first premium?

Q. Yes. A. No, sir; I am not.

Q. Cannot you in any manner state what date that was? Haven't you got any memorandum by which you can arrive at the date?

A. Well, I have got some memorandum regarding the payment. It is somewhat scattered. He gave his notes and other payments.

Q. What date do these notes bear?

A. There were two dated October 22nd, and one September 23rd, if I remember correctly.

Q. For how much?

A. The aggregate was eight hundred and eight dollars.

Q. How does it come the notes were dated on different dates?

A. I don't know. The entry is not made in my hand-

writing. It was made by one of the clerks, and I don't know how this is.

Q. How did Phinney pay this premium?

Objected to by defendant as immaterial.

Objection overruled. Exception allowed.

A. He gave some cash, and gave his notes for eight hundred and eight dollars, and a deed for some property.

Q. What cash did he give you?

A. I do not remember.

Q. Do you know the amount in cash? A. No.

Q. Did you deposit it in the bank?

A. I presume I did.

Q. Cannot you show on what date?

A. I haven't looked it up.

Q. Cannot you find out how much it was?

A. I might.

Q. State whether or not Phinney paid you two premiums in advance? A. He did not.

Q. Did not he pay you three premiums in advance?

A. No.

Q. How much cash do you think he paid?

A. Well, I don't remember.

Q. Can you give me an idea about it?

A. I found one entry. I looked over my books carefully last night to refresh my memory, and I found one entry in October, two hundred dollars cash, G. C. Phinney.

Q. That was October, when?

A. October, 1890; I forget the date. It is October. It is on account of this premium.

Q. Two hundred dollars? A. Yes, sir.

Q. Now, what was this deed to this property that you have spoken of?

A. It was a deed to me from Herman Chapin, vice-president of the Boston National Bank, six hundred dollars.

Q. You owed Phinney a note and mortgage of about fourteen hundred dollars at that time?

A. I do not remember whether that was paid at that time or not. It was subsequently paid.

Q. Do you remember at the time that was due?

A. No; I do not.

Q. I will ask you if that is the note and mortgage (showing paper to witness).

A. I think it is; yes, sir.

Q. Now, was not that in part payment of this policy?

A. It was not.

Q. Did not you state to Mr. Jones very recently that it was? A. I did not.

Q. You notice that this mortgage was due on the 23rd of October, do you not?

A. About that time.

Q. That was the date of the mortgage, was it not? Well, now, on this very day that this mortgage was due, how does it come that Mr. Phinney gave you a note due in three months for three hundred and fifty dollars, and you owed him fourteen hundred and forty dollars on that date?

A. Mr. Phinney owed me for the life insurance premium, and I owed Mr. Phinney a balance on some property in Lake Union Addition for which this mortgage was

given in part payment. I paid that mortgage to the Boston National Bank; I think the note and mortgage are hypothecated by Phinney at the Boston National Bank, and it was paid there, if I remember correctly, and there were two distinct, separate transactions.

Q. You would pay that by check would you not?

A. I don't know whether I would or not.

Q. Would you pay so large an amount as that in cash to the Boston National Bank?

A. I presume I would pay it by check. I think I have the check.

Q. Can you furnish that check?

A. I think I can. Yes, sir.

Q. Now, Mr. Stinson, this mortgage is satisfied November 1, 1890? A. Apparently, yes.

Q. That is about the time the policy was delivered, was it not? A. Very near.

Q. Probably the same day? Was it not, or the day after? A. Very near; I don't know as to that.

Q. You owed Phinney another mortgage, did you not?

A. There were two other gentlemen and myself bought some blocks of Phinney, and it was made out in my name. I gave a mortgage and took papers from the other two gentlemen, if that is what you refer to.

Q. You notice that Guy C. Phinney satisfied this fourteen hundred dollar mortgage on the first day of November? A. I noticed something to that effect.

Q. This other mortgage that you owed Guy C. Phinney, you are the maker of that mortgage are you not?

A. I think so.

Q. That is for twenty-five hundred dollars, is it not?

A. I think I gave him a note and mortgage of that kind.

Q. That was at the time, October 28, 1889, was it not? That is the date of it?

A. Somewheres along there.

Q. That was dated October 28, 1890?

A. I bought some property from Phinney in September, 1890, and some in October, 1889, and I gave mortgages in both cases, and they are both paid.

Q. One of these mortgages I have just called attention to was to E. P. Ferry, and assigned to Phinney?

A. I think so.

Q. The fourteen hundred dollar one?

A. I think so; yes, sir.

Q. And the other twenty-five hundred dollars you made direct to Mr. Phinney? This was also satisfied of record on November 1, 1890?

A. I don't know as to that. I do not remember.

Q. Probably this will refresh your memory (showing paper to witness).

A. Well, I could only say in a general way. I presume that is correct.

Q. Both of these mortgages were satisfied the same day. Now, on October 22, Mr. Phinney gave you his note, which you took, for five hundred dollars, and both of these mortgages almost matured; is that right?

A. It might have been.

Q. And then you gave him another October 23rd, the

same day this other mortgage was due, for three hundred and fifty dollars, when you owed him on that day fourteen hundred and forty dollars; is that true?

A. It might have been.

Q. How would that occur? Would you take his note when you were paying him and he had fourteen hundred dollars of your money?

A. Phinney had hypothecated the notes so that they were no good to me. They were in Boston National Bank.

Q. You would pay a large amount as this by check?

A. Yes, sir.

Q. Can you get that check?

A. Yes, sir; I will get it if you want it.

Q. I do want it. Did you ever receive any other money than the two hundred dollars and the six hundred dollars in lots?

A. His notes were eventually paid.

Q. When were these notes paid?

A. They were not paid when due.

Q. How long after due?

A. Well, I think one of them ran about a year and a half.

Q. When was the first one due?

A. I think in sixty days.

Q. When was that paid? A. I could not say.

Q. Was it paid as early as February?

A. Perhaps so.

Q. Was it paid as early as January?

A. I have no means of recollecting the dates these

were paid along, and the last one ran about a year and a half.

Q. This was delivered on November 1st. Did he pay anything in December?

A. Not that I remember.

Q. Did he pay you any in May, 1891?

A. He might have.

Q. Was that in payment of premium? (Showing paper to witness.) A. That was.

Q. $359—that was paid in December, was it not?

A. Yes, sir.

Q. That was not on either of these notes—the two or three notes you have mentioned. This was paid before these notes matured?

A. I could not tell without looking at the notes. The note dated September 23rd I forgot the length of time it ran for. I can tell by getting the books.

Q. And you can get these checks for these mortgages?

A. I can get what checks passed between us regarding that property.

Q. I would like to have you get your checks.

A. All right, sir.

Q. You say that you did not tell Mr. Jones here two or three months back—a month or two back—that this first mortgage was in part payment of the premium—the first premium? A. No; I did not.

Q. You had a talk with Jones, did you not?

A. Mr. Jones and I mentioned the case several times.

Q. You recollect the time? A. No.

Q. Well, now, at either of these conversations, or any

of them, that you had with Jones in the last two or three months, you did not tell Mr. Jones that either one of these mortgages was paid in part payment of the premium?

A. I did not; no, sir.

Q. Was anybody present when you had these conversations with Mr. Jones? A. I do not think so.

Q. How much discount, Mr. Stinson, did you make on this first premium? A. Quite a liberal one.

Q. Well, state how much.

A. Mr. Phinney was an insurance agent, I believe, some time, and I allowed him the regular commission.

Q. I would like to know the amount, the rebate?

A. I don't care to answer that question unless I have to. I don't care to state the commission.

Objected to as immaterial.

Objection sustained, for the reason that it is not proper cross-examination. Exception allowed.

Q. How much did it take to pay the first premium?

Objected to by defendant as immaterial.

Objection overruled. Exception allowed.

The Court.—I think defendant's counsel asked if the witness knew of the first premium being paid. I will allow the question.

Q. How much was the rebate?

A. I do not remember the exact amount.

Q. Well, as near as you can recollect.

A. I think I allowed him forty per cent off.

Q. Now, that was the original. Now, on the original plan he asked for a twenty year life, didn't he?

A. I think not; no, sir.

Q. I mean straight life. A. Ordinary.

Defendant objects for the same reason.

Objection overruled. Exception allowed.

Q. What was the amount of ordinary pay life, when he applied for it?

A. That applied to the premium as paid, $3,770.

Q. What would it be on straight ordinary life as he originally applied for it, not the second application?

A. You mean what would be the premium?

Q. Yes, sir; on the original application?

A. It would be about five hundred dollars less, I guess.

Q. It would be three thousand dollars, would it not?

A. It is a little more.

Q. How much more? You are an insurance agent, you can tell exactly from his age? A. Yes, sir.

Q. Please tell me. His age is 38.

A. It would be just exactly three thousand dollars.

Q. Forty per cent of that would be twelve hundred dollars? Yes, sir.

Q. Now, you first figured on that basis in paying the premiums, did you not, and took your notes on that basis?

A. If I took any notes at that time—I don't know whether I did or not.

Q. You took notes on October 22, for five hundred dollars, did you not?

A. I think on October 22; yes.

Q. You just stated heretofore that that five hundred dollar note was dated September 22.

A. No; I said two notes were dated October 23, and one September 22.

Mr. Warburton. There are certain matters that I would like to be permitted to cross-examine the witness on after he gets his books and papers.

Q. You are not sure whether these notes were on September 22, the two notes for two hundred and fifty dollars each. A. No, I am not positive.

Q. Now, cannot you refresh your recollection that about October 22, the company in New York refused to issue upon a straight life, and asked a twenty-year endowment, and that after some considerable dickering with Phinney, you finally agreed that he should accept a twenty-pay life; is not that true?

Objected to by defendant as immaterial.

Objection sustained. Exception allowed.

Q. Was this check for part payment?

A. Yes, sir.

Q. Was that check payment of one of these notes?

A. I think it is part payment.

Paper identified by the witness marked plaintiff's Exhibit "M," for identification.

Q. I show you this check and ask if it was in payment of premium.

A. I think that is on account of one of the notes that he gave; yes.

Paper identified by the witness marked plaintiff's Exhibit "N," for identification.

Check dated December 3, 1890, for $359.20, heretofore

identified, marked plaintiff's Exhibit "O," for identification.

Plaintiff offers in evidence identification "M," "N," "O."

The Court. You can offer them at the proper time in your own testimony.

Mr. Warburton. We desire to recall the witness for further cross-examination.

The Court. I will let you recall him later on.

Redirect Examination.

Q. (By Mr. Gilman.) Did you have several real estate transactions with Mr. Phinney? A. Yes, sir.

Q. I will ask you whether or not in the year 1889 and '90, you dealt in real estate? A. Yes, sir.

Q. You may state what real estate deals with Mr. Phinney entered into this consideration for this policy.

A. Several lots in Phinney's Supplemental Park—I think it is Woodland Park Addition. Four lots in Block 64, Supplemental Plat of Woodland Park Addition.

Q. Now, this mortgage for twenty-five hundred dollars, made on the 28th day of October, 1889, you recollect how long a time that had to run?

A. I only had the deed. I gave so much cash, and gave a mortgage on this same property.

Q. Do you recollect of paying it?

A. I think I paid it all at one time to Chapin, of the Boston National Bank.

Q. That was also true of the fourteen hundred dollar mortgage? A. Yes, sir.

Q. I will ask you whether or not these mortgages entered in any way into this insurance contract?

A. It did not; no, sir.

Q. Now, at the time this policy was surrendered to you —counsel spoke of it having been borrowed—was there any understanding it should be returned?

A. No, sir.

Q. Was there any understanding between you and Phinney, as to what the state of the policy was at that time, whether alive or dead?

A. He stated to me that the policy had lapsed, it was no good to him; take it if I wanted it. That is the conversation as near as I can recollect it.

Q. Now, I will ask you as to the course of business in reference to renewals. These premiums paid subsequent to the first premium. Can the agent allow any discount on these? A. On the renewals.

Q. Yes.

A. Only except out of his own pocket. He can give it away if he wants to.

Q. The renewals you have to return pretty nearly the full amount to the company?

A. Yes, there is nothing in them, practically.

Q. (By Mr. Warburton.) Mr. Stinson, you are not any longer an agent of the company?

A. What company?

Q. The Mutual Life Insurance Company of New York?

A. No, sir.

Q. You are heavily indebted to the company, or to the general manager of the company?

Objected to by counsel for defendant as not proper

cross-examination. Objection sustained. Exception allowed.

(Testimony of witness closed.)

WILLIAM S. POND, witness called on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By Mr. Gilman. You reside in Seattle?

A. In Seattle, Washington.

Q. And what is your business?

A. I am at present the general agent of the Mutual Life Insurance Company of New York.

Q. What territory does your agency cover?

A. Washington, Oregon, and British Columbia.

Q. How long have you held that position?

A. Since the first of January, 1895.

Q. Were you connected with the company before that time?

A. Before that I was a representative of Mr. Forbes, of San Francisco.

Q. What I want to get at is this, did you assume Stinson's position at the time he left it?

A. Yes, sir; I assumed it as manager for Forbes, and in the first of this year I was appointed the general agent direct from New York.

Q. So that since Stinson left the company you have been its head in this state? A. Yes, sir.

Q. And that was in the latter part of 1893 that you assumed that position?

A. Well, in November, 1893, I came here as cashier for Mr. Forbes, and it was after Mr. Stinson was discontinued that I became manager.

Q. Now, during the time that you have had charge of the business of the company in this state up to July, 1894, what, if any, claim was made by Mrs. Phinney to you upon the policy now in suit?

A. There was no claim made until an inquiry was made in July, 1894.

Q. Who made that inquiry?

A. The first inquiry came by telephone. I could not identify it exactly.

Q. I will ask you whether or not you ever learned from Mrs. Phinney who it was that telephoned?

A. I think the first intimation I had of any claim from Mrs. Phinney was the coming to my office of some clerk, who told me that Mrs. Phinney had telephoned to know about her husband's insurance, and so as soon as I came in I looked up the record. That was the first knowledge I had that there was a policy, or had been a policy, at all. I found out in the old book that there was a policy for one hundred thousand dollars taken in 1890, and lapsed after the payment of the first premium.

Q. Did you go to the telephone?

A. Yes. And within a day I think I called up Mrs. Phinney myself. I am not sure it was a telephone at the residence, or how it was, but I communicated a second time; but she asked if I was the manager, and I said yes, and she inquired whether Mr. Phinney had a policy in the company, and I inferred from the conversation that she didn't know how much it was, or the number of it, or anything about it—in fact, she asked me the amount.

Q. At that time did Mrs. Phinney ask the amount of the policy?

A. Yes, sir; asked for how much he was insured. I said he had a policy for a hundred thousand dollars, but it was not in force. I think she inquired whether it was possible that it would be in force, and I said no, not unless the premiums had been paid direct to the home office which seemed highly improbable, because both he and Stinson lived in the city, and the natural course would be to pay them through him, so I then wrote to San Francisco to inquire if possibly these premiums had been paid. and found out substantially that the policy had lapsed after the paymen of he firs premium.

Cross-Examination.

Q. (By Mr. Burleigh.) Mr. Pond, when you had informed Mrs. Phinney that policy had lapsed, you supposed that it lapsed because you understood the premiums had not been paid, did you not? A. Yes, sir.

Q. You know nothing of that transaction whatever of your own knowledge? A. Which transaction?

Q. The Phinney insurance. A. No.

Q. You were not connected with the company, you say, until Mr. Stinson went out? Now, what time in 1893 was that? A. June, 1894.

Q. Do you know when Phinney died?

A. No. I think it was about three years and a half, taking the insurance as far as I recollect.

Q. When was it, with reference to this time, when Stinson went out and you took charge?

A. I never looked that up. He probably died before that though, but I am not quite sure.

Q. You took charge in June, 1894?

A. June, 1894.

Q. You had no personal knowledge of anything that transpired in connection with the company's business here prior to that time, or say the 12th of September, 1893?

A. No. I didn't come here until the end of November, 1893, and then as cashier.

(Testimony of witness closed.)

(At this time further proceedings were adjourned until to-morrow morning at 10 o'clock.

Seattle, July 27, 1895. Continuation of proceedings pursuant to adjournment at 10 o'clock A. M.

DR. J. B. EAGLESON, a witness called on behalf of the defendant being first duly sworn, testified as follows:

Q. (By Mr. Gilman.)—You are a physician and surgeon practicing at Seattle? A. Yes, sir.

Q. In September, October, November, and December, 1891, were you the medical examiner of the Mutual Life Insurance Company of New York?

A. I was.

Q. Were you also the medical examiner of the Equitable Life Insurance Company? A. Yes, sir.

Q. Now, do you recollect in September, 1891, examining Guy C. Phinney for insurance in the Equitable Life?

A. Yes, sir.

Q. Can you state the date of that examination?

A. I think it was September 30.

Q. Now, subsequent to that date was any application made to you—What, if any application subsequent to that time was made to you for a certificate of health on the part of Guy C. Phinney for the Mutual Life?

Objected to by plaintiff unless shown application was made by Phinney.

Counsel for defendant states he wishes to show that the result was communicated to Phinney.

Objected to by plaintiff as incompetent, irrelevant, and immaterial.

Objection sustained; exception allowed.

Q. I will ask this question, stating to the Court that Mr. Stinson testified, without objection that he went to Dr. Eagleson for a certificate of health for Mr. Phinney: How long after the 30th of September when the examination was made for the Mutual (?) Life was it that Mr. Stinson came to you asking for a certificate of health for Phinney.

Objected to as incompetent, irrelevant, and immaterial by plaintiff.

Objection sustained; exception allowed.

Q. I will ask you whether or not about the middle of November, 1891, Mr. Stinson made an application to you as medical examiner of the Mutual Life Insurance Company, the defendant in this action, for a certificate of health for Guy C. Phinney?

Objected to by plaintiff as incompetent, irrelevant, and immaterial, and as leading.

Objection sustained, on the ground that it is incompetent and irrelevant. Exception allowed.

(Testimony of witness closed.)

Mr. Gilman.—Mr. Stinson was requested on yesterday, if the Court please, to produce certain documents. I think we have them all here.

Mr. Warburton.—I desire to cross-examine him further.

MR. F. L. STINSON recalled for further cross-examination:

Q. (By Mr. Warburton.) Are you now able to tell the exact amount of cash received by you on this policy?

A. Within a few dollars, yes.

Q. How much was it, cash?

A. I do not remember of any cash except the payment of the notes.

Q. You said on yesterday you received $200?

A. Yes, $200.

Q. When did you receive that?

A. That was in October—I meant in addition to my testimony yesterday.

Q. You received two hundred dollars in cash in October? A. Yes, sir.

Q. September 22 G. C. Phinney made two notes to you for $250 each, did he not?

A. Well, I think it was October 22 that he made two notes.

Q. Have you got your book here?

A. Yes, sir.

Q. Will you show it?

A. Yes, sir; September 23 it was.

Q. $500? A. Yes, sir.

Q. Two years? A. Yes, sir.

Q. When did the notes mature?

A. The record shows that they matured February 23 and March 23, 1891.

Q. When was the other note dated?

A. October 22, 1890.

Q. They matured in February, did they not?

A. That one matured in March, 1891.

Q. That was $308, was it not. A. Yes, sir.

Q. When were these notes paid?

A. I could not tell definitely when they were paid.

Q. Have you not any memorandum stating when they were paid? A. No.

Q. Was each note taken up wholly at the time it was paid?

A. I don't think so. It was so long ago I do not remember.

Q. Have you no record at all by which you can refresh your recollection about that?

A. No; I have n't.

Q. What is that book you hold in your hand?

A. This is bills receivable and payable book.

Q. For 1890 and 1891?

A. Yes; for 1890 and 1891.

Q. Have you got a note of G. C. Phinney payable in September or October, 1891, there in that book?

A. If I have, I have not noticed it.

Q. Just look through, and see if you have?

(Witness examines book.)

Q. You cannot find any?

A. I do not see any.

Q. Now, have you made search to find out when these notes were paid?

A. Yes, sir; I have looked.

Q. You cannot find it?

A. No, sir; I cannot find any record.

Q. Would the Boston National Bank know? I see that you marked on there, deposited with Boston National Bank?

A. They might; I don't know.

Q. I will ask you, Mr. Stinson, if Mr. Phinney, in the month of July or August, 1893, had any conversation with you with reference to whether he had better surrender or reduce the amount of this policy in the Mutual Life Insurance Company of New York, or whether he had better reduce the amount he held in the New York Life.

A. What year was that?

Q. July or August, 1893?

A. I do not remember any such conversation.

Q. Did you have a conversation with Mr. Phinney at the foot of the stairs of your office, either in the month of July or August, in the presence or close to Mr. Barber and C. A. Mitchell—you know the New York Life Insurance agents—in which the conversation was concerning whether it was most advisable to reduce your policy, the amount of the policy held in your company, or the amount held in the New York Life?

A. I do not remember any such conversation.

Q. If you had had such a conversation you would remember it? A. I think I would; yes, sir.

Q. I hand you a letter and ask you to identify it, Mr. Stinson.

Mr. Gilman.—We will admit these that have been identified as his signature by other parties. We admit these are his signatures.

Q. Is there any relation existing between you and counsel for defendant, Mr. Gilman—are you a brother-in-law of Mr. Gilman's? A. Yes, sir.

Q. Was it not your custom, and did you not in several instances, namely: at least Van Haseltine and Mr. Heilbron, deliver a policy in the Mutual Life Insurance Company to them, and receive in payment therefor three years' advance in property?

Objected to by defendant as incompetent, irrelevant and immaterial.

Objection sustained; exception allowed.

Q. You were the agent of the Mutual Life Insurance Company? A. Yes, sir.

Q. Did Mr. McCurdy know that you were agent of the Mutual Life Insurance Company of New York?

Objected to by defendant as incompetent, irrelevant, and immaterial.

Objection sustained; exception allowed.

Q. You had a conversation, or one or two conversations with Mr. Daniel Jones—you know Mr. Jones—with reference to how Mr. Phinney paid the first premiums on this policy, did you not?

A. The first premium; I think so.

Q. In your office?

A. I do not remember whether in my office or not.

Q. You remember, do you not, of showing him some papers in your office, a mortgage—and gave him the number of the mortgage and volume, and place where it is to be found of record?

A. I do not remember showing him any mortgages. I showed him some deeds.

Q. You remember that circumstance; you remember one time when he was in there?

A. I remember showing Jones some deeds.

Q. That is the time I refer to—about six weeks ago.

A. It was a short time ago.

Q. Did you not then state to Mr. Daniel Jones that this larger mortgage which I showed you yesterday, or the smaller one—one or both—was paid in that way?

A. In what way?

Q. Those mortgages were paid by crediting Phinney with so much insurance on his first premium?

A. I did not; no, sir.

Q. Or words to that effect?

A. I did not tell him how anything but the first premium was paid in any way.

Q. How the second premium was paid?

A. I said anything but the first premium.

Redirect Examination.

Q. (By Mr. Gilman.) Mr. Stinson, in 1889 did you buy some property from Guy C. Phinney.

A. I did.

Q. Through whom did the title come?

A. I think it was through E. P. Ferry.

Q. I will ask you to look at that paper and see if that is the deed you received? A. Yes, sir.

Paper identified by witness offered in evidence by defendant.

The Court.—I do not think it necessary to introduce that much matter in the record. The mortgages have been introduced, and you can show how and when they were paid.

Q. Now, look at these certified copies—that is the mortgage, is it not given to Guy C. Phinney to secure the payment of the sum of $2500, dated the 28th day of October, 1889? A. Yes, sir.

Q. You gave that mortgage, did you not?

A. I did.

Q. I will ask you if that did not evidence the payment—was not that security for the payment of two notes, one for $2,000 and one for $500?

A. Yes, sir.

Q. Look at this and see if they are the notes?

A. Yes, sir.

Defendant offers in evidence notes identified by the witness.

Papers received without objection, and marked defendant's Exhibits 2 and 3 respectively.

EXHIBIT 2.

$2000.00. Seattle, Wash., Oct. 28th, 1889.

On or before one year after date, for value received, I promise to pay to the order of Guy C. Phinney, at the

Puget Sound National Bank, in the city of Seattle, the sum of two thousand dollars, with interest at the rate of ten per cent per annum from date until paid. The interest shall be paid at the expiration of every twelve months, and if not so paid to be compounded with the principal and draw interest at the same rate. And if suit shall be commenced for the recovery of any amount due upon this note, I agree to pay a counsel fee of five per cent upon the amount which may be found to be due.

FRED L. STINSON."

[Endorsed on face]: "The Boston National Bank of Seattle. Paid Nov. 1, 1890. Note Teller."

EXHIBIT 3.

$500.00. "Seattle, Wash., Oct. 28, 1889.

On or before six months after date, for value received, I promise to pay to the order of Guy C. Phinney, at the Puget Sound National Bank, in city of Seattle, the sum of five hundred dollars, with interest at the rate of ten per cent per annum from date until paid. The interest shall be paid at the expiration of every six months, and if not so paid to be compounded with the principal and draw interest at the same rate. And if suit shall be commenced for the recovery of any amount due upon this note, I agree to pay a counsel fee of five per cent upon the amount which may be found to be due.

FRED L. STINSON."

(Endorsed across the face.)

"Paid January 21, '91."

(Endorsed on back.)

"Without recourse on me. Guy C. Phinney, Daniel

Jones. Sept. 12th, 1890. Received on the within three hundred and fifty dollars, Daniel Jones."

"Defendant's Exhibit 3. Filed July 26, 1885, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Then on the 23rd day of October, 1889, you made a mortgage to Gov. Ferry for sixteen hundred and fifty dollars, did you not? A. Yes; about that time.

Q. Was that mortgage afterwards assigned to Guy C. Phinney? A. It was.

Q. This is the mortgage, is it not?

A. Yes, sir.

Q. Now, referring to the sixteen hundred and fifty dollar mortgage, did you make any payments thereon prior to the first day of November, 1890.

A. Yes, sir.

Q. Did you make a payment to Gov. Ferry or to Mr. Phinney for him?

A. Well, I made the payment, I think it was to—

Q. Did you receive a satisfaction at that time?

A. I did.

Q. I will ask you to look at that satisfaction and see if it is the satisfaction referred to. A. Yes, sir.

Defendant's counsel offers paper identified by witness in evidence. Paper received without objection, and marked Defendant's Exhibit 4.

EXHIBIT 4.

"Be it known, that I, Elisha P. Ferry, for and in consideration of three hundred and sixty-one dollars and fifty cents ($361.50) lawful money of the U. S., to me in

hand paid, receipt whereof is hereby acknowledged, said amount being the balance of the purchase money for the hereinafter described property, do hereby certify and declare that a certain mortgage bearing date the twenty-third day of October, 1889, made and executed by Fred L. Stinson, the party of the first part therein, to Elisha P. Ferry, the party of the second part therein, which said mortgage was recorded in the office of the county auditor of the county of King, and State of Washington, in volume —— of Mortgages, on page ——, on the —— day of October, 1889, is hereby fully paid, satisfied, and discharged as to the following lots, to wit: lots one (1), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), eighteen (18), nineteen (19), and twenty (20), all of said lots being in block two (2) of the Lake Union Second Addition to the city of Seattle, State of Washington, and the said lots are hereby forever released from the operation and effect of said mortgage.

In witness whereof, I have hereunto set my hand and seal this 24th day of December, A. D. 1889.

[Seal] ELISHA P. FERRY.

Signed, sealed, and delivered in the presence of A. Martin."

"State of Washington, } ss.
County of King. }

This is to certify that, on the 24th day of December, 1889, before me, a notary public, in and for the State of Washington, duly commissioned and sworn, personally came Elisha P. Ferry, to me known to be the individual

described in, and who executed, the within instrument, and acknowledged to me that he signed and sealed the same, as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal, this day of , 1889.

W. T. CAVANAUGH,
Notary Public."

(Endorsed): "No. 44605. Elisha P. Ferry to Fred L. Stinson. Satisfaction of Mortgage. Filed for record at the request of F. L. Stinson, Dec. 27, A. D. 1889, at 6 min. past 3 P. M., and recorded in Vol. 43, of Mtgs., page 427, records of King County, Wash. W. R. Forest, Co. Auditor."

"Defendant's Exhibit 4. Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. I will ask you, if afterwards, you made a payment to Phinney, and received a satisfaction of mortgage?

A. Yes, sir.

Q. Is this the satisfaction you received from Mr. Phinney? A. Yes, sir.

Q. Do you know the amount of payment received on this satisfaction, or can you ascertain it?

A. I think I can tell the amount. There is a check for that.

Q. Look at your stub book, and see if you can tell the amount. A. Yes, sir; $210.30.

Q. What is the date? A. September 3, 1890.

Q. The satisfaction bears date the 28th of August,

1890. Do you know whether or not it is the same transaction? A. It was.

Q. Then you made two payments, one of $361.50 and the other $210—that left about how much due on the mortgage?

A. A little over ten hundred dollars.

Defendant offers in evidence satisfaction of mortgage identified by the witness.

Paper received without objection and marked defendant's Exhibit 5.

EXHIBIT '5.

Know all men by these presents, that I, Guy C. Phinney, do hereby certify and declare that a certain mortgage, bearing date the 23rd day of October, 1889, made and executed by Fred L. Stinson, party of the first part therein, to E. P. Ferry, the party of the second part therein, and duly recorded on the 28th day of October, 1889, in the office of the auditor of King County, in Volume 41 of Mortgages, at page 381, which said mortgage was by said E. P. Ferry duly assigned to me by assignment of mortgage, dated April 24, 1890, and recorded in the office of the county auditor of the county of King and State of Washington, in Volume 48 of Mortgages, on page , on the 24th of April, 1890, together with the debt thereby secured, is fully paid, satisfied, and discharged as to lots 2, 3, 4, 14, 15, 16 and 17, in Block 2 of Lake Union 2d Addition to the city of Seattle, and said lots are hereby fully released and discharged from the lien of said mortgage.

In witness whereof, said party of ithe first part has

hereunto set his hand and seal, the 28th day of August 1890.

[Seal] GUY C. PHINNEY.

Signed, sealed, and delivered in presence H. S. Turner, D. H. Blackmar.

State of Washington, } ss.
County of King, }

This is to certify, that on this 3rd day of September, A. D. 1890, before me, D. H. Blackmar, a notary public, in and for the State of Washington, duly commissioned and sworn, personally came Guy C. Phinney, to me known to be the individual described in, and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal] D. H. BLACKMAR,

Notary Public in and for Washington, residing at Seattle."

"61815. Satisfaction of mortgage. From Guy C Phinney to Fred L. Stinson. Dated Sept. 3d, 1890."

"State of Washington, } ss.
King County. }

I hereby certify that the within instrument was filed for record in the office of the auditor of King County Wash., at the request of Fred L. Stinson, on Sep. 3, 1890 at 40 min. past 12 o'clock M., and that it has been recorded and is now of record in Volume 58 of Mtgs., on page

247 of the records of said county. W. R. Forest, Auditor King Co., Wash."

"Defendant's Exhibit 5. Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M Hopkins, Deputy."

Q. Now then, returning to the twenty-five hundred dollars mortgage which secured two notes, one for two thousand and one for five hundred dollars, what became of those notes?

A. One of those notes was hypothecated with Daniel Jones—the five hundred dollar note.

Q. This same Daniel Jones they have been talking about?

A. Yes, sir. And the other one was hypothecated at the Boston National Bank.

Q. Take the first five hundred dollar note which was hypothecated with Daniel Jones. Do you know Daniel Jones' signature? A. Yes, sir.

Q. Is that his signature on the back there?

A. It is.

Q. Receipting the acknowledgment of how much money? A. Three hundred and fifty dollars.

Q. I will ask you to look at that check; is that the check given to Jones for the three hundred and fifty dollars. A. Yes, sir.

Defendant offers in evidence check identified by witness. Paper received without objection, and marked defendant's Exhibit 6.

EXHIBIT "6."

Seattle, Washington, Sept. 12th, 1890.

The Boston National Bank of Seattle pay to the order ofDaniel Jones $350 three hundred and fifty dollars.

No. 369. F. L. STINSON."

[Endorsed]:

"Daniel Jones."

Defendant's Exhibit 6. Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Do you recollect when you finally paid that note?

A. I think January 31, 1891. It is marked on the note.

Q. You stated that two thousand dollar note had been hypothecated with the Boston National Bank.

A. Yes, sir.

Q. Was the sixteen hundred and fifty dollar note, less the payments that had been made, also hypothecated with the Boston National Bank?

A. That is where it was paid—I presume it was.

Q. Now, on what day did he pay it? You can refresh your memory from the check.

A. November 1, 1890.

Q. Is that the check with which you paid it?

A. Yes, sir.

Q. This two thousand dollar note bears the stamp of the Boston National Bank as paid on that date?

A. Yes, sir.

Q. Were the mortgages that the check was given to pay satisfied on the same date?

A. Yes, sir.

Q. What, if any, notes other than this sixteen hundred and fifty dollar note and the twenty-five hundred dollars did you give to Guy C. Phinney?

A. I do not remember of any notes except these.

Q. I will ask you whether or not you communicated to Mr. Phinney the result of you visit to Dr. Eagleson for a certificate of health? A. I did.

Recross-Examination.

Q. (By Mr. Warburton.) Have you the $210 check?

A. I have the stub-book.

Q. What is the date of that?

A. September 3, 1890.

Q. Did you owe the Boston National Bank any money yourself outside of these notes in November, 1890? Out side of these notes that were hypothecated there?

Objected to as immaterial by defendant.

Objection overruled. Exception allowed.

Q. You say you did owe the bank?

A. Yes, sir.

Q. How much? A. I dont know.

Q. How are you positive about the fact that this check was payable to the Phinney note?

A. Because the bank-book shows it.

Q. Have you any record or anything else so that you can in any manner tell how much you owed the bank at that time? A. Personally?

Q. Well, in any way outside of these Phinney notes?

A. No; but the bank book will show it. I don't know myself, for I haven't looked it up.

Q. Do you think you owed as much or more than this payment? A. I think perhaps so.

Q. Did you take up any other papers on that date in the bank? A. I do not think so.

Q. (By Mr. Gilman.) Your bills receivable book shows that two of the notes bear date September 22. Is there any memorandum or anything that will show when they were delivered to you?

A. The notes were delivered to me?

Q. Yes, sir.

A. Except that it is marked here that they were deposited at the Boston National Bank.

Q. At what date. A. November 10, 1890.

Q. Have you any recollection when the deposit was made with reference to delivery?

A. I do not exactly understand your position.

Q. Have you any recollection how long you kept the notes after they were delivered to you before they were deposited?

A. Well, no; I presume only a short time.

Q. Have you no recollection of the particular circumstances? A. No, sir.

Q. What was your custom with reference to depositing notes?

Objected to by plaintiff as immaterial.

The Court. I understand these notes were deposited as collateral security?

Q. For what purpose were these notes deposited with the Boston National Bank?

A. To receive cash.

Q. Did you discount them? A. Yes, sir.

Q. What was your custom, say, with reference to discounting notes received in your business, if you had a custom?

Objected to by plaintiff as incompetent, immaterial.

Objection sustained. Exception allowed.

Q. (Mr. Warburton.) Do you know the date of this policy? A. September 24, 1890, I think.

Q. Do you know when the policy was issued by the company? A. Only by the date; that is all.

Q. Don't you know that you received a telegram stating it would be issued on or about the 22nd of October?

A. I do not remember; the telegram will show. I don't remember.

Q. Now, Mr. Stinson, if the first premium was not paid or provided for, is it not a fact that what you call a C. O. D. policy, the policy would be dated on the date of the issuance of the policy?

A. The policy naturally would be dated the date of the issuance of the policy.

Q. When the premium is paid in advance, and a binding receipt is given so as to insure the risk, providing the insurance is accepted and the money is paid in advance, then the policy bears date of the application?

Objected to by defendant as immaterial.

Objection sustained. Exception allowed.

(Testimony of witness closed.)

HERMAN CHAPIN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By Mr. Gilman.) You reside in Seattle?

A. Yes, sir.

Q. In what business are you engaged?

A. Banking business.

Q. With what bank are you connected?

A. Boston National Bank.

Q. In what capacity? A. President.

Q. Were you connected with that bank in the year 1890? A. Yes, sir.

Q. Do you know Mr. Fred L. Stinson?

A. Yes, sir.

Q. Did you know Mr. Guy C. Phinney?

A. Yes, sir.

Q. I will ask you whether or not Mr. Stinson and Mr. Phinney were doing business with your bank in September, 1890? A. Yes, sir.

Q. I will ask you to look at this check marked defendant's Exhibit "7," and state whether that check was paid by your bank on the first day of November, 1890?

Objected to by plaintiff as incompetent, irrelevant, and immaterial, and as relating to a collateral matter.

Objection overruled. Exception allowed.

A. Yes, sir.

Q. Is there any record in your bank book, or papers in your bank, that shows to whose account it was paid, and for what it was paid?

Mr. Burleigh. I suppose it is understood that all this

evidence goes in subject to our objection, so that there is no necessity of repeating it?

The Court. Yes, sir; your objection is overruled, and exception allowed.

A. Well, the check was paid at the bank and from this deposit ticket, the same amount. I should say it was paid and placed to the account of G. C. Phinney, special, which was an account, to the best of my recollection, made in order to—

Q. (By Mr. Burleigh.) Who made that deposit slip?

A. I did myself. That is in my handwriting. To the best of my recollection, it was a part payment on an obligation of Mr. Phinney's.

Q. (By Mr. Gilman.) Does that memorandum that you made yourself at the time show on what it was paid, that is, by Mr. Stinson?

A. It is here, Stinsons notes, $2000; interest, $202.20; note, $1076.90; and interest, $134.90. Beyond that I have no recollection.

Q. Have you any recollection as to whether or not the Stinson notes were deposited there as collateral security for Phinney's obligation?

A. I have no record of that.

Q. You do not keep a record of collateral notes?

A. No, sir; except on the original note. It is marked on the note for which it is collateral.

Q. You have not that original note of Phinney now?

A. No, sir.

Q. (By The Court.) Do you keep a record of discounts when you take securities and discounts?

A. Yes, sir.

Q. Did you look to see whether this was discounted at the bank? A. This is a collateral note.

Q. The Stinson note?

A. No; I did not look; no, sir.

Q. (By Mr. Gilman.) If a note was put in by Mr. Phinney as collateral for his own obligation, it would not go as discounted paper, would it—there would be no record of his discounted paper?

A. If the note—

Q. No. To make it clear to you, if Mr. Phinney gave his obligation to the bank, and gave collateral to secure it, this collateral that he gave to secure it would not pass through the bank as discounted paper?

A. No.

Q. And the record of that paper would only appear on the original note.

A. Yes; on the original note.

Q. On Phinney's principal note, and there would be no other record of it in the bank? A. No.

Q. And this original note has been surrendered?

A. I suppose so.

Cross-Examination.

Q. (By Mr. Burleigh. What is the amount of this ticket? A. $3414.

Q. How much of the proceeds of that $3414 actually went to Phinney's credit in your bank?

A. Well, the whole of it, I imagine from this ticket.

Q. Can you tell from the ticket whether it did or not?

A. I cannot tell whether this check paid that ticket; no, sir.

Q. (By Mr. Gilman.) It corresponds in amount?

A. Yes, sir; each are $3414.

Q. That ticket shows it was paid on Stinson's notes?

A. Yes, sir.

Q. (By Mr. Burleigh.) Stinson owed you other money at that time, did n't he?

Objected to by defendant as immaterial.

Objection overruled. Exception allowed.

A. I cannot tell here.

Q. What is your best recollection about it?

A. Stinson owed us money at times about that time. If I should give a guess I should say yes.

(Testimony of witness closed.)

Defendant offers in evidence the ticket and check referred to by witness.

Objected to by plaintiff for the same reasons urged to the testimony of the witness Chapin.

Objection overruled. Exception allowed.

Papers received and marked Defendant's Exhibits 7 and 8, respectively.

EXHIBIT "7".

"Seattle, Wash., Nov. 1st, 1890.

The Boston National Bank of Seattle pay to the order of Boston Nat. Bank $3414 (Thirty-four hundred & fourteen dollars).

F. L. STINSON."

[Endorsed]: "Defendant's Exhibit '7.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

EXHIBIT 8.

"Deposited in Boston National Bank of Seattle by G. C. Phinney Special, Seattle, Nov. 1, 1890.

Stinsons	
Notes	2000.
Int.	202.20
Note	1076.90
Int.	134.90
	3414.00"

[Endorsed]: "Defendant's Exhibit 8. Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Defendant rests.

Plaintiff's Rebuttal.

DANIEL JONES, witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Q. (By Mr. Burleigh.) Where do you reside?

A. Seattle.

Q. How long have you lived here?

A. Seven years.

Q. What is your business?

A. Real estate broker.

Q. Were you acquainted with Mr. Phinney?

A. Yes, sir.

Q. Do you know Mr. Stinson? A. I do.

Q. Did you have a conversation with Mr. Stinson about six weeks ago at his office concerning the subject of the payment of premiums on this insurance policy, in controversy in this case, by Mr. Phinney?

A. I did.

Q. State whether or not, in that conversation, Mr. Stinson stated to you that Mr. Phinney had partially paid the premiums on that insurance by cancellation of the mortgage or mortgages on the Lake Union Second Addition, or words to that effect.

A. He did not say it exactly that way. I asked him the question——

Objected to by defendant.

Q. I say, or words to that effect.

Objected to by defendant.

Objection overruled. Exception allowed.

Q. Did he say in effect, Mr. Jones, that Mr. Phinney had paid part of these premiums by the cancellation of mortgages or a mortgage on that Lake Union Second Addition?

A. A mortgage on Lake Union Second Addition, he did.

Q. What did he say?

Objected to by defendant.

Objection overruled. Exception allowed.

A. Having been the agent of the addition, I asked him the question, if any property or mortgages that affected that Lake Union Second Addition had been paid in these settlements with G. C. Phinney on this insur-

ance, and he gave me—he says yes, and he gave me the date or a memorandum showing the page of the book of a mortgage.

Q. Do you recollect what that date or page was?

A. I recollect that the date of the mortgage was in 1889 and was made for one year's time. I do not recollect the page and book—the mortgage book that it was recorded in, although I marked it down at the time.

Q. Have you the memorandum that you made at the time?

A. I have not. In conversation with Warburton afterwards, I gave it to him.

Q. You did give it to him? A. Yes, sir.

Q. Do you remember the amount of the mortgage that was cancelled? A. No, sir; I do not.

Cross-Examination.

Q. (By Mr. Gilman.) Now, is not this what Mr. Stinson told you—did not you ask him if any of these property deals entered into the premium for that insurance?

A. The question had been asked by the plaintiff's agent in reference to this particular transaction of Lake Union Second, and I went to Stinson purposely—I had forgotten, although I had been the agent, and I went to Stinson purposely to find out about Lake Union Second Addition. That is the question I asked him.

Q. Stinson did not tell you, as I understand it, that he cancelled these mortgages on Lake Union Second in part payment of premium?

A. He said one of them had been applied in that way.

Q. Did he say which one?

A. Yes, sir; he gave it only by book and page.

Q. You know that the twenty-five hundred dollar mortgage was not applied in that way?

A. I don't know anything about it, only from what I heard in the courtroom today, which recalls to my mind that five hundred dollars was paid to me.

Q. Stinson paid five hundred dollars of the twenty-five hundred dollar mortgage? A. Yes, sir.

Q. Now, Mr. Stinson, did he tell you that he took property for a portion of that premium?

A. He told me he also took lots in Woodland Park, and he corrected it as Woodland Park Supplemental, and he gave me the book and page of that also.

(Testimony of witness closed.)

Under a commission duly issued out of said Circuit Court, the plaintiff caused to be taken the deposition of H. E. Duncan, corresponding secretary of said company, a resident of the State of New York, by a commissioner duly appointed for that purpose, a resident in the State of New York, and plaintiff now read in evidence the said deposition, which was as follows:

Mr. Duncan's Deposition.

Q. State your name, residence, and occupation since January 1st, 1890.

A. Henry E. Duncan, corresponding secretary of the Mutual Life Insurance Company of New York.

Q. Did the company receive any other report or information of any kind from any source as to the character and habits of said Guy C. Phinney other than that contained in his application? If so, what?

A. Not that I remember. There are no papers on file with us showing it.

Q. Did the Mutual Life Insurance Company of New York instruct any of its agents, especially A. B. Forbes, or A. B. Forbes & Son of San Francisco, or F. L. Stinson of Seattle, not to accept the second premium on said Guy C. Phinney's policy after September 24th, 1891?

A. Not that I am aware of.

Q. Was there any entry or record made in the books of the company prior to September 1st, 1891, which showed, or was intended to show or indicate to the officers or agents of the said company that said Guy C. Phinney was not a desirable risk for the company to carry?

A. None whatever, either prior to Sept. 1st, 1891, or prior to the time the premium became due.

Q. What negotiations were had, if any, with Guy C Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by or on behalf of the company looking toward that end?

A. Mr. Forbes had charge of that matter, and it was attended to in the West. After the premium was due and unpaid, Mr. Stark made reports, of which the following are true copies:

(Sheet 1.)

No. 422198. Amount $100,000.
Name, Guy C. Phinney.
Residence, Seattle, Washington.
Business, Pres. City National Bank.
Date of investigation, Jan. 22, 1892.

Remarks.

Financially all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

[Signed] STARK.

(Sheet 2.)

No. 422198. Amount $100,000.
Name, Guy C. Phinney.
Residence, Seattle, Washington.
Business, Pres. City Natl. Bank.
Date of investigation. Forfeited.

Remarks.

All right fin. but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

[Signed] STARK.

Awaiting particulars.

Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C Phinney? State fully the instructions given said parties·

if in writing, attach a copy of the same to this deposition and properly identify it.

A. Mr. Forbes has charge of this matter, and it was attended to in the West.

Q. Attach to your deposition every writing of every kind or description, between the Mutual Life Insurance Company of New York, and its agents, or between it and Guy C. Phinney, that in any manner related to or is connected with a waiver and abandonment or rescission of the contract.

A. No such writings on file in this office. It was attended to in the West. When—

Q. When was the Mutual Life Insurance Company of New York first informed that a mutual agreement has been consummated between it and Guy C. Phinney, wherein it was mutually agreed that the said policy of insurance on Phinney's life should be waived, abandoned, or rescinded? A. In the fall of 1891.

Q. Give the name of the party or agent who gave the company such information, and attach the original, or a copy of the letter, to this deposition, and properly identify it, or, if you have not the original, then attach a copy of it.

A. The matter was attended to by Mr. Forbes and his representatives in the West, and our information came from that source. I can find no letters on our files regarding this matter.

Q. When was the Mutual Life Insurance Company of New York first informed that said Phinney had surrendered his policy to it? Give the name of the party or agent who so informed the company, and attach the or-

iginal letter, or a copy, to this deposition, and properly identify it?

A. My answers to Nos. 9 and 10 cover this question.

Q. What report was made to the company of New York by either F. L. Stinson, of Seattle, or A. B. Forbes, or A. B. Forbes & Son, of San Francisco, as to the collection or non-collection of the second premium on the Phinney policy, number 422198?

A. The attached and marked Exhibit "A" is a true and exact copy of that portion of the monthly account of A. B. Forbes, general agent, which refers to the non-payment of the premium by Phinney.

In order to understand those papers, it is necessary for me to state the method of collecting premiums which is pursued by the company. Each month a statement is sent to Mr. Forbes of premiums which will become due in the following month, together with renewal receipts for each premium. Such an account was sent to Mr. Forbes in the month of August, 1891, which contained a receipt for the premium due on the Phinney policy in 1891. Mr. Forbes had no power to deliver this receipt to the insured except upon receipt of the premium. In the month of October, 1891, it was the duty of Mr. Forbes to send to the company a statement in the form which I produced (Exhibit "A") showing the premiums paid and unpaid during that month. Mr. Forbes did send, October, 1891, a statement in the form above referred to, which was the statement made out by the company and sent to him; it is the custom to draw a red line through any premium which is not paid, and return the renewal

receipt. I produce here the original report sent by Mr. Forbes, and also a copy of so much of the report as relates to the Phinney policy. The red lines indicate that the Phinney premium was not paid. The renewal receipt came back at the same time. These renewal receipts for unpaid premiums are always, within a short time of their receipt, destroyed by the company, and the Phinney receipt was so destroyed. An entry is then made on the books of the company that the premium is unpaid, and the policy is forfeited. The word "forfeited" is used to cover all cases, including those where there is an acquiescence in a forfeiture, and a mutual agreement of forfeiture. This was done in the Phinney case. I produce the original register containing the register of this policy and other policies of the company. This register contains the following entry: "Forfeited Sep. 25th, 1891. Do not restore, 2nd vice-president, 28th March, 1892."

Q. Please attach to this deposition the original or copy of such report, and properly identify it.

A. I produce the original of such report. Exhibit "A" is a copy of said original.

Q. In what manner did the policy of Guy C. Phinney, number 422198, appear on the books of the company on the 12th day of September, 1893, as to whether it was a live, dead, or terminated policy?

A. I produce here a book of the company, and the entries therein are as follows: "Forfeited Sep. 25th, 1891. Do not restore, 2nd vice-president, 28th March, 1892."

Q. Make a true copy or copies of the entry or entries

on such book or books, stating where found, and attach them to this deposition, and properly identify them.

A. I have answered this.

Q. If your answer to preceding interrogatories disclose that the policy appeared on the books of the insurance company as a dead or terminated policy, state whether it was designated as a "lapsed" or "forfeited" policy. A. I have answered this.

Q. Was the Mutual Life Insurance Company of New York ever informed by one Nellie Phinney, executrix, that said Guy C. Phinney had died in September, 1893?

A. The company's records do not show this, and I have no recollection of it.

Q. If you answer the preceding interrogatory in the affirmative attach said letter to this deposition, if you can, and properly identify it.

Q. Did the Mutual Life Insurance Company of New York ever answer the letter above described? If so, when and by whom was such letter signed?

A. Have no letter; nor is there any record in the office of such letter having been written to the plaintiff.

Q. Did the Mutual Life Insurance Company, in 1894, receive two affidavits, one signed by Nellie Phinney, stating that Guy C. Phinney had died on or about the 12th day of September, 1893? If so, attach to this deposition said affidavits, and properly identify them.

A. Not that I remember; I find, however, that on a printed form we acknowledged receipt to Mrs. Phinney of an affidavit, but this paper cannot be found, and I have no knowledge of its nature or contents.

Q. Do you know, or can you set forth any other mat-

ter, or anything which may be of benefit or advantage to the parties at issue in this cause, or to either of them, or that may be material to the subject of this your examination, or matters in question in this cause? If yes, set forth the same fully and at large in your answer.

A. No.

Under a commission duly issued out of said Circuit Court the plaintiff caused to be taken the deposition of Richard A. McCurdy, the president of said company, a resident of the State of New York, by a commissioner duly appointed for that purpose, a resident of the State of New York, and plaintiff now read in evidence the said deposition, which was as follows:

Richard A. McCurdy's Deposition.

Q. State your name, residence, and occupation since January 1st, 1890.

A. Richard A. McCurdy, president of the Mutual Life Insurance Company of New York.

Q. What relation, if any, existed between the Mutual Life Insurance Company, of New York, A. B. Forbes, and A. B. Forbes & Son, of San Francisco, California, and F. L. Stinson, of Seattle, at all times between January 1st, 1890, and October 1st, 1893 State fully.

A. A. B. Forbes was the general agent for the Pacific Coast, including the State of Washington. No relation existed between this company and Mr. Forbes' son or A. B. Forbes & Son. No relation existed between this company and F. L. Stinson.

Q. If, in answer to interrogatory four, you say that

F. L. Stinson, of Seattle, Washington, represented the said Mutual Life Insurance Company of New York, as agent, state fully his powers and duties in every particular; if his agency was created by writing, attach the original, otherwise a copy, and properly identify it.

A. Mr. Stinson did not represent the company as its agent.

Q. Did the Mutual Life Insurance Company of New York, in the year 1890 and 1891, have employed an "Inspector of Risks," or person whose duty it was to report upon the risks being carried in the State of Washington, by the Mutual Life Insurance Company of New York? If so, state his name; if more than one, state the names of each.

A. From about December, 1891, and through 1892, Ernest Stark was employed by the company to make investigations into risks carried in the State of Washington, and also into risks recently abandoned after forfeiture or otherwise, as insured were liable to make application for restoration, and it was more economical to examine all risks, whether in force or not, at one time.

Q. Did not Guy C. Phinney apply for a policy of insurance on the ordinary life plan? Objection sustained.

A. Yes.

Q. How did it come that the policy issued was a twenty pay life policy? What motive did the company have in requiring or asking the change? Objection sustained.

A. The company did not require or ask the change. The records show that Mr. Phinney asked for it.

Q. Please attach originals or copies of all correspond-

ence that passed between the company and its agents, respecting the change from ordinary life to twenty pay life, and properly identify them.

A. The records in New York have been examined and there is none, except the request in the usual form, of which the following is a copy. (Exhibit "A." R. A. McC.)

Q. Did the company receive any other report or information of any kind from any source as to the character and habits of said Guy C. Phinney other than that contained in his application? If so, what?

A. Not that I know of.

Q. Did the Mutual Life Insurance Company of New York instruct any of its agents, especially A. B. Forbes, or A. B. Forbes & Co., of San Francisco, or F. L. Stinson, of Seattle, not to accept the second premium on said Guy C. Phinney's policy after September 24th, 1891?

A. Not to my knowledge or belief.

Q. Was there any entry or record made in the books of the company prior to September 1st, 1891, which showed, or intended to show, or indicated to the officers or agents of the said company that said Guy C. Phinney was not a desirable risk for the company to carry.

A. There was none.

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by or on behalf of the company looking toward that end.

A. I do not know of any.

Q. What party or parties were employed or re-

quested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach a copy of the same to this deposition, and properly identify it.

A. I know of none.

Q. Attach to your deposition every writing of every kind or description between the Mutual Life Insurance Company of New York and its agents, or between it and Guy C. Phinney, that in any manner related to or is connected with a waiver, an abandonment, or rescission of the contract.

A. There are no writings in this office except Mr. Forbes' report of the premium unpaid, and the executive direction not to restore, which latter is as follows: "Forfeited Sept. 25, 1891. Do not restore. 2nd Vice-President. 28th March, 1892."

Q. When was the Mutual Life Insurance Company of New York first informed that a mutual agreement had been consummated between it and Guy C. Phinney, wherein it was mutually agreed that the said policy of insurance on Phinney's life should be waived, abandoned, or rescinded. A. In 1891, or early in 1892.

Q. Give the name of the party or agent that gave the company such information, and attach the original or a copy of the letter to this deposition, and properly identify it; or if you have not the original, then attach a copy of it. A. There are no letters here.

Q. When was the Mutual Life Insurance Company of New York first informed that said Phinney had surrendered its policy to it? Give the name of the party or

agent who so informed the company, and attach the original letter or a copy to this deposition, and properly identify it.

A. I have just answered this question in the last questions you have asked me.

Q. Do you know or can you set forth any other matter, or anything which may be of benefit or advantage to the parties at issue in this cause, or to either of them, or that may be material to the subject of this your examination, or matters in question in this cause? If yes, set forth the same fully and at large in your answer.

A. No.

(At 12 o'clock further proceedings adjourned until 1:30 P. M.)

EXHIBIT "A." (R. A. McC.)

The Mutual Life Insurance Company of New York,
Office, Nassau, Cedar and Liberty streets.

The undersigned, Guy Carleton Phinney, hereby requests the Mutual Life Insurance Company of New York to change application made under date of Sept. 22nd, as follows: To 20 payment life 20 years distribution, and to issue a policy in accordance with said change.

And in consideration thereof, I hereby covenant and agree that all the statements made by me or in my behalf, contained in the original application and declaration for a policy of insurance in the Mutual Life Insurance Company of New York, and dated Sept. 22nd, 1890, are full, complete, and true, and are hereby made the basis of the contract between me and the said company

for the new policy hereby solicited, which is accepted, subject to all the conditions and stipulations contained therein.

Dated at Seattle, State of Wash., this 22nd day of October, 1890.

In the presence of F. L. Stinson.

(Signature of applicant).

GUY CARLETON PHINNEY.

(Signature of person proposed for insurance.)

GUY CARLETON PHINNEY.

Afternoon session. Continuation of proceedings pursuant to adjournment at 1:30 o'clock.

MR. A. B. FORBES, recalled by plaintiff.

Q. (By Mr. Burleigh.) I want to ask you two or three questions in reference to this case. First, I want to inquire if you were instructed or notified by the Mutual Life Insurance Company of New York not to accept the second premium on the Phinney policy, No. 422198, after September 24, 1891?

Objected to by defendant as incompetent, irrelevant, and immaterial, and not proper rebuttal.

Objection overruled. Exception allowed.

A. I was.

Q. Did you give like notice and instructions to F. L. Stinson, or forward to him any such instructions and notice given by the company with reference to the Guy C. Phinney policy?

Objected to by defendant for the reasons stated in the last objection.

Objection overruled. Exception allowed.

A. I did.

Q. What negotiations were had, if any, with Guy C. Phinney looking toward a resolution, waiver, or abandonment of his contract of insurance? State very fully everything said and done by or on behalf of the company looking toward that end.

A. That was a matter that I left the detail of to my agent here. I gave him the principal instructions, and the rest he had to perform.

Q. What instructions did you give him?

A. By telegram.

Q. Any other?

A. Perhaps a letter confirming the telegram.

Q. These documents have been put in evidence in this case?

A. I think so—I don't know whether they have or not.

Q. I will ask you to look at that copy attached to your deposition, Mr. Forbes, and state if that is your signature?

A. That is my signature there; this letter is a copy of the one received from Mr. Stinson.

Q. Please look at the document which I hand you, and state what that is. (Showing witness plaintiff's identification "K.")

A. That is a letter from Mr. Stinson returning the premiums unpaid.

Plaintiff offers in evidence plaintiff's Exhibit "K" for identification.

Objected to by defendant as incompetent and not proper rebuttal.

Objection overruled. Exception allowed.

EXHIBIT "K."

Seattle, Washington, Nov. 26th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

No. 114293	Curtis	No. 393675	Rogers
415957	Cushing	416309	Rice
418420	Calhoun	420062	Benson
441063	Raymore	441073	Patterson

September.

No. 51342	Janney	No. 270465	McKay
287091	O'Connor	307195	Mohr
373328	Finch	373530	Heaton
375371	Buttner	412636	Anderson
418608	Monroe	422198	Phinney (Offered to pay but in ill health.
		434207	Behrman

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipts asked for) will be reported in next acct.

Yours very truly,

F. L. STINSON."

[Endorsed]: "Plaintiff's Exhibit 'K.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. I show you Plaintiff's Exhibit "L" for identification.

A. Yes, sir. That is a letter I received from Mr. Stinson.

Plaintiff offers in evidence Plaintiff's Exhibit "L" for identification.

Papers received without objection, and marked Plaintiff's Exhibit "L."

EXHIBIT "L."

"Seattle, Washington, Dec. 10th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: Your wire of the 9th inst., reading: "If tendered, decline acceptance September premium, No. 422198, Phinney," duly received.

This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON."

Across the face appears:

"A. B. Forbes, Dec. 14, 1891. General Agent, S. F."

[Endorsed]: "Plaintiff's Exhibit 'L.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did you, on or about the 9th day of December, 1891, on receipt of telegraphic instructions from the company, repeat the same to Mr. Stinson, at Seattle, in these words: "If tendered, decline acceptance of September premium 422198"?

A. I presume that is the record there; that is so. We repeated the telegram as we received it from New York.

Q. And you state, as I understand you, that you know nothing of any negotiations looking to the rescission or abandonment of the Phinney policy?

A. No; for this reason: we sent the premium receipt to New York as forfeited. It was notice to the company of all that. Their wires covered all the ground, and then the details had to be left with the agent here.

Q. That settled the matter, so far as you are concerned?

A. That settled the matter, so far as I was concerned. I will say here, it is not an uncommon thing to have people pay the first year's premium and then come in and want to negotiate for time, or something I cannot give them, and they hand over their policies.

Q. Did you ever have any direct correspondence with Mr. Phinney on the subject of his insurance?

A. Never; I think not, sir. Mr. Stinson was my agent.

Q. All you know of this case, then, you derived from reports and correspondence between yourself and Mr. Stinson?

A. Yes, sir; he was my agent, and acted as such.

Q. (By Mr. Gilman.) I understand you, Mr. Forbes, that your different subagents have the right and authority to take up canceled policies?

A. They have.

Q. (By Mr. Burleigh.) Is it a part of the duty of

your subagent to gather up policies which have become forfeited for nonpayment of premium?

A. It is not a part of their duty, but whenever these policies are tendered to them, they are bound to receive them.

Q. Whenever a party comes voluntarily and offers to give it up, you take it?

A. We have no property in it until the party gives it to us.

(Testimony of witness closed.)

Plaintiff offers in evidence, papers heretofore marked for identification Exhibits "M," "N," "O."

Papers received without objection and marked Plaintiff's Exhibits "M," "N," "O,' respectively.

EXHIBIT "M."

Seattle, Wash., Aug. 5th, 1891. No. 146.

The Guarantee Loan & Trust Co., pay to F. L. Stinson, or order, bearer, $150.00 (one hundred and fifty dollars.

G. C. PHINNEY.

(Stamped on face.)

"Guarantee Loan & Trust Co., Paid, Aug. 6, 1891, Seattle, Wash."

(Stamped on back.)

"Pay only through the Seattle Clearing House. The Boston National Bank, Aug. 6, 1891. Ten of Seattle."

[Endorsed]: Plaintiff's Exhibit "M." Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.'

EXHIBIT "N."

"The Guarantee Loan & Trust Company (Incorporated).

Seattle, Wash., May 7th, 1891.

No. 255.00.

Pay to F. L. Stinson, or order, $255.00 (two hundred and fifty-five dollars).

G. C. PHINNEY."

[Endorsed]: "F. L. Stinson."

(Stamped on back): "The Merchants' National Bank, paid May 8, 1894. Four through the Clearing House."

[Also Endorsed]: "Plaintiff's Exhibit 'N.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

EXHIBIT "O."

"Seattle, Wash., Dec. 3rd, 1890.

The Boston National Bank of Seattle, pay to the order of F. L. Stinson $359.20 (three hundred & fifty-nine & 20-100 dollars).

G. C. PHINNEY."

No. Ins. Premium.

[Endorsed on back]: "F. L. Stinson."

"Plaintiff's Exhibit 'O.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Plaintiff rests.

Under a commission duly issued out of said Circuit Court, the plaintiff caused to be taken the deposition of William J. Easton, the secretary of said company, a resi-

dent of the State of New York, by a commissioner duly appointed for that purpose, a resident in the State of New York, and defendant now read in evidence the said deposition, which was as follows:

Mr. Easton's Deposition.

Q. State you name, residence, and occupation since January 1st, 1890?

A. My name is Wm. J. Easton, and I reside in the city and county of New York. I am now, and have been since January 1st, 1890, the secretary of the Mutual Life Insurance Company of New York. I was secretary prior to that time.

Q. What relation, if any, existed between the Mutual Life Insurance Company of New York, A. B. Forbes, A. B. Forbes & Son, of San Francisco, California, and F. L. Stinson, of Seattle, Washington, at all times between January 1st, 1890, and October 1st, 1893? State fully.

A. Mr. A. B. Forbes was the general agent of the company for the Pacific Coast, which included among others the State of Washington. I am informed that Mr. Forbes' son had some partnership relations with his father, but no relations existed between this company and his son. Between F. L. Stinson and this company no direct relations existed. I am informed that Mr. Stinson acted for Mr. Forbes in various matters.

Q. If in answer to interrogatory four, you say "that F. L. Stinson of Seattle, Washington, represented the said Mutual Life Insurance Company of New York as agent; state fully his powers and duties in every par-

ticular; if his agency was created by writing, attach the original writing or a copy, and properly identify it.

A. Mr. F. L. Stinson had no agency from this company created by writing. I think I have just answered the rest of this question.

Q. Did the Mutual Life Insurance Company of New York in the year 1890 and 1891 have employed an "Inspector of Risks," or persons whose duty it was to report upon the risks being carried in the State of Washington by the Mutual Life Insurance Company of New York? If so, state his name, if more than one, state the names of each.

A. Mr. Stark did report upon risks which were being carried or had been carried at some time in the State of Washington in the latter part of 1891 and 1892. But I do not think he was called an "Inspector of Risks." Lists of risks in existence and risks recently terminated by forfeiture or otherwise were given him to examine.

Q. Did Guy C. Phinney apply for a policy of insurance on the ordinary life plan? A. Yes.

Q. How did it come that the policy issued was a twenty pay life policy? What motive did the company have in requiring or asking the change?

A. Policy issued was a 20 pay life policy, because Phinney wanted it. The company did not require or ask for any change, but Phinney signed our usual form when applicants desire a change.

Q. Please attach originals or copies of all correspondents that passed between the company and its

agents respecting the change from ordinary life to twenty pay life, and properly identify them?

A. I have looked for any correspondence, but there is none. We received the request for the same from the Pacific Coast Agency.

Q. Did the company receive any other report or information of any kind from any source as to the character and habits of said Guy C. Phinney, other than that contained in his application? If so what?

A. Mr. Forbes sent us two letters, true copies of which are the following:

Wilber Manufacturing Agency.

To John H. Elder, Esq., of Seattle, Washn.

Please furnish subscriber No. 78,509, whose card is above attached, answers as full as possible to the following suggestive questions in relation to the financial standing of Guy C. Phinney, of Seattle. Business—banker & broker:

1. What is the financial and business standing of? Good.

2. What are his social habits? Good.

3. Is he temperate in living? Yes.

4. Do you know of anything which will make him ineligible for life insurance? No.

Remarks: He has had some sickness in past year, but nothing serious.

Date: 189

Inquiry.

Dear Sir: Please forward by return mail, as per in-

closed stamped envelope, such information as you have regarding the business standing of

Name: Guy C. Phinney.

Business: Banker and broker.

Address: Seattle.

Subscribers name.

Address.

Questions. *Reply.*

Please advise financial and all right financially and business standing, also habits, qualities. He perhaps takes his glass of wine, but nothing of a sport about him. I do not like this man at all, but my dislike has its foundation in matters that do not affect his worth as a citizen.

Note.—Subscriber must inclose postage for reply. Attorneys will recognize but one inquiry on each blank. It will be an act of courtesy on the part of the subscribers to give their legal business and collections to the attorneys of this agency.

The originals are in the hands of our lawyers in the West. The original of the letters to which I have just referred came in the first place into my hands as secretary.

Q. Did the Mutual Life Insurance Company of New York instruct any of its agents, especially A. B. Forbes or A. B. Forbes & Son, of San Francisco, California, or F. L. Stinson, of Seattle, not to accept the second premium on said Guy C. Phinney's policy after September 24th, 1891.

A. Not that I am aware of, or find any record of.

Q. Was there any entry or record made in the books of the company prior to September 1st, 1891, which showed, or was intended to show, or indicate to the officers or agents of the said company, that said Guy C. Phinney was not a desirable risk for the company to carry.

A. No; I have looked at the record and do not find any. I do not find any prior to Sept. 1st, 1891, or prior to the date the premium became due and was not paid, which I think was Sept. 24th, 1891.

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance. State very fully everything said or done by or on behalf of the company looking toward that end.

A. I do not know everything that was said or done by or on behalf of the company, but Mr. Phinney, about the second time the second year's premium was due wanted to know whether notes would be accepted instead of cash, but he was informed that only cash would be accepted. Mr. Phinney thereupon delivered up his policy and did not pay any premium upon it.

Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties; if in writing, attach a copy of the same to this deposition and properly identify it.

A. I do not know of any instructions, and there are no such writings in my possession.

Q. Attach to your deposition every writing of every

kind or description between the Mutual Life Insurance Company of New York and its agents, or between it and Guy C. Phinney, that in any manner related to or is connected with a waiver, an abandonment, or rescission of the contract.

A. Mr. Forbes reported the premium as unpaid, and the annexed, marked Exhibit "A," is a copy of his report. An entry was also made in the books of the company relating to the waiver, abandonment, and rescission of the contract as follows:

"Forfeited Sept. 25th, 1891. Do not restore. 2nd Vice-President, 28th March, 1892."

The memorandum "do not restore," made by the 2nd vice-president, is one made in the usual course of business, after information has been received in regard to a risk which has terminated. After risks have terminated for various reasons, it is not at all unusual for the insured to apply for a restoration. In such cases a new medical examinaion is held, and if this examination is satisfactory to the medical department and there is no objection, the policy is restored on payment of the premiums in arrear with interest.

After premium was unpaid, Mr. Stark made these reports to Mr. Forbes:

No. 422,198. Amount, $100,000.

Name, Guy C. Phinney.

Residence, Seattle, Washington.

Business, Pres. City National Bank.

Date of inestigation, Jan. 22, 1892.

Remarks.

Financially, all right. He is growing very heavy and flabby. His drinking habits are commenting upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

[Signed] STARK.

No. 421,198. Amount, $100,000.
Name, Guy C. Phinney.
Residence, Seattle, Washington.
Business, Pres. City Natl. Bank.
Date of investigation, Jan. 22, 1892.

Remarks.

All right fin. but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

[Signed] STARK.

Awaiting particulars.

Q. When was the Mutual Life Insurance Company of New York first informed that a mutual agreement had been consummated between it and Guy C. Phinney, wherein it was mutually agreed that the said policy of insurance on Phinney's life should be waived, abandoned, or rescised? A. In the fall or autumn of 1891.

Q. Give the name of the party or agent that gave the company such information, and attach the original or a copy of the letter, to this deposition, and properly identify it, or if you have not the original, then attach a copy of it.

A. The Pacific Coast Agency; I have looked but do not find letters on this matter.

Q. When was the Mutual Life Insurance Company of New York first informed that said Phinney had surrendered his policy to it? Give the name of the party or agent who so informed the company, and attach the original letter or a copy to this deposition, and properly identify it.

A. My answer to this has been given to you.

Q. What report was made to the company of New York, by either F. L. Stinson, of Seattle, A. B. Forbes or A. B. Forbes & Son, of San Francisco, as to the collection or noncollection of the second premium on the Phinney Policy, No. 422198?

A. Mr. Forbes made a report, a copy of which I have given you in my answer to one of the previous questions.

Q. Please attach to this deposition the original or copy of such report, and properly identify it.

A. I have done this.

Q. In what manner did the policy of Guy C. Phinney, number 422, 198, appear on the books of the company on the 12th day of September, 1893, as to whether it was a live, dead, or terminated policy?

A. This book of the company, which I produce here, has in it the following entries: Forfeited Sept. 25, '91. Do not restore. 2nd Vice-President, 28th March, 1892.

Q. Make a true copy or copies of the entry or entries on such book or books, stating where found, and attach them to this deposition, and properly identify them.

A. I have done so.

Q. If your answer to preceding interrogatories disclose that the policy appeared on the books of the insurance company as a dead or terminated policy, state whether it was designated as a "lapsed" or "forfeited" policy.

A. The word "forfeited" was used. This word is used when a policy is terminated after premium unpaid, or when policy is terminated by nonfulfillment of the assured of any other condition in the policy, or when a policy holder abandons or waives his contract with the company.

Q. Do you know, or can you set forth any other matter, or anything which may be of benefit or advantage to the parties at issue in this cause, or to either of them, or that may be material to the subject of this your examination, or matters in question in this cause? If so, set forth the same fully and at large in your answer.

A. Yes, I can. The date of the Phinney policy is September 24, 1890, and one premium was paid thereon and only one. There was a premium due on September 24th, 1891, which was not paid. On that date, September 24th, 1891, assuming that the age of the insured was 39 years, as I understand it was, the tabular contribution of the above-mentioned premium to the reserve fund of the company was $1,903.80. Taking $1,903.80 as a single premium for temporary insurance, assuming that the policy was entitled to be kept in force for a certain time after default in payment of any premium, the period of such extension would consist of 2 years and 36 days. The extension would there expire not later than Nov. 1st, 1892.

I am familiar with the New York statute regarding the interest that shall remain to the policy holder after failure to pay a premium. I have annexed a copy of said statute to my deposition, and marked it Exhibit "B." This statute, as I understand, was passed in 1879, and is still in force.

This statute contemplates the payment of three annual premiums on a policy before an insurance company is required to apply the reserve on the policy to the continuation of the insurance, or to the purchase of a paid-up policy. This company would not have applied the reserve to the purchase of a paid-up policy, nor would the company have paid anything for the surrender of the policy, since only one premium has been paid.

The Phinney policy, after being executed here, was sent to our Pacific Coast Agency for delivery to the insured in Washington, upon payment of premium.

EXHIBIT "A."

The Mutual Life Insurance Company of New York,
In Account with
A. B. Forbes, General Agent,
San Francisco, California.

Premium When Due.	No. of Policy	Amount of Premium	Collection.
September 24, 1891.	422198.	$3770.	

EXHIBIT "B."

SURRENDER VALUE OF LAPSED OR FORFEITED POLICIES.—Whenever any policy of life insurance issued after January first, eighteen hundred and eighty,

by any domestic life insurance corporation after being in force three full years, shall, by its terms, lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American experience table of mortality at the rate of four and one-half per cent per annum shall, on demand made, with surrender of the policy with six months after such lapse or forfeiture, be taken as a single premium on life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of the lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance payable at the same time and under the same conditions, except as to payment of premiums, as the original policy. If no such agreement be expressed in the application or policy, such single premiums may be applied in either of the modes above specified, at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy.

The reserve hereinbefore specified shall include dividend additions calculated at the date of the failure to make any of the payments above described according to the American experience table of mortality with interest at the rate of four and one-half per cent per annum after

deducting any indebtedness of the insured on account of any annual or semi-annual or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing.

The net value of the insurance given for such single premium under this section, computed by the standard of this State, shall in no case be less than two-thirds of the entire reserve, computed according to the rule prescribed in this section, after deducting the indebtedness as specified; but such insurance shall not participate in the profits of the corporation.

If the reserve upon any endowment policy applied, according to the provisions of this section, as a single premium of temporary insurance be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term on the conditions on which the original policy was issued.

This section shall not apply to any case where the provisions of the section are specifically waived in the application and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued.

End of the evidence.

Twenty-eighth Exception.

The Court, in its charge to the jury, among other things charged the jury as follows:

"It is contended that the policy was not continuing as a live policy and binding contract at the time of Mr.

Phinney's death on account of this provision in the policy.

"'The annual premium of three thousand seven hundred and seventy dollars shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, and on the 24th day of September in every year during the continuance of this contract until premiums for twenty full years shall have been duly paid to said colpany.

"'Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. If this policy shall become void by nonpayment of premiums, all payments previously made shall be forfeited to the company, except as hereinafter provided.'

"It is claimed by the defendant that by reason of the condition in the policy which I have read to you, and the failure of Mr. Phinney in his lifetime to make the payments which matured and became payable on the 24th day of September, 1891, and the 24th day of September, 1892, the policy lapsed, and the rights of Mr. Phinney under it were forfeited, so that it was not a continuing policy at the date of Mr. Phinney's death in 1893.

"Now, gentlemen, the law on this subject is this:

These stipulations and provisions in the contract are controlled by positive statute of the State of New York. This policy was issued by a company doing business in New York, and by its terms the company became obligated to perform its contract in the State of New York, Mr. Phinney agreed to make his payments in New York, and the company was entitled to have proo of the death of Mr. Phinney made at its home office in New York. The State of New York is the place for the performance of the contract, and as to the obligations of the parties with respect to performing the contract on both sides, the laws of the State of New York must be applied.

"The law of the State of New York, therefore, dominates and controls the provisions and stipulations which I have read. The statute of New York which I have referred to makes this provision with reference to the forfeiture of life insurance policies by insurance companies doing business in the State of New York for nonpayment of premiums.

"Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the persons to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or of the assignee of the policy if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, by an agent of such company, or person appointed by it to collect such premium. Such

notice shall further state that unless the said premium or interest when due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and the payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made thirty days limited, therefor, the same shall be taken to be a full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding. But no such policy shall in any case be forfeited, or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice; provided, however, that the notice state when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided at least thirty and not more than sixty days prior to the time when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

It is also a part of the provisions of the same statute that life insurance companies doing business in New York shall not have power to forfeit any life insurance policy for nonpayment of premiums, unless they give this kind of a notice, and comply with this statute in regard to the mailing of the notice, either giving notice in advance of the due date of the premium at leas irty days, and not more than sixty days before the dat , or giving the notice afterwards and allowing thirty days from the date of mailing the notice for the payment of the premium.

Without a compliance with this requirement, after the mailing of notice, the laws of New York deprive the insurance company of the power to forfeit the insurance policy. Compliance with this statute is an indispensable preliminary to the forfeiture for nonpayment of premiums, against the will and without the consent of the person insured. Strict compliance is required. If a notice does not contain the matters that the statute specifies must be in the notice, it is not a compliance, and the company would have no power to forfeit an insurance policy by reason of sending such defective notices. If a notice sent in advance, or prior to the date when the premium is due, is mailed twenty-nine days before that date, it is not a legal notice; it does not comply with the statute. If it should be sent sixty-one days before the date on which the premium is due, it would not be a compliance with this statute.

The rights of the insurance company under the terms of this policy and statute of New York would be these: That the company would have a right to insist upon the payment of each annual premium on the date specified in the policy. They have a right, by sending a notice, to exact the payment on that date and to forfeit the policy and all premiums paid for nonpayment on that date. But in order to enjoy that right it is necessary that the statute of New York as to mailing the notice must be complied with. There is no proof in this case that the notice required by the statute of New York was ever sent to Mr. Phinney.

To which said instructions the Court, subsequent to the conclusion of said charge, and while the jury were still

at the bar, defendant duly excepted in writing, and its exception was duly allowed by the Court.

Twenty-ninth Exception.

The Court, in its charge to the jury, among others, gave the following instructions to the jury:

"If the evidence in this case shows that Mr. Phinney did voluntarily, without being induced by false representations or deceit, rescind the contract and give up the policy, rather than to continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy so that it would no longer be a continuing contract."

To which instruction of the Court to the jury, at the conclusion of the charge, and while the jury was still at the bar, defendant duly excepted in writing, on the ground that there was no evidence showing, or tending to show, any fraud, false representations or deceit, and defendant's exception was duly allowed by the Court. The evidence in this cause relating to the rescission of the contract and the surrender of the policy by the assured was as is stated in the twentieth and twenty-third exception herein, and also the following.

The deposition of W. J. Easton, secretary of the company, was introduced in evidence, and among others the following interrogatories and answers thereto were read in evidence:

After premium was unpaid, Mr. Stark made these reports to Mr. Forbes:

No. 422198. Amount, $100,000.

Name, Guy C. Phinney.

Residence, Seattle, Washington.
Business, Pres. City National Bank.
Date of investigation, Jan. 22, 1892.

Remarks.

Financially, all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

(Signed) STARK.

No. 422198. Amount, $100,000.
Name, Guy C. Phinney.
Residence, Seattle, Washington.
Business, Pres. City National Bank.
Date of investigation. Forfeited.

Remarks.

All right fin., but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

(Signed) STARK.

Awaiting particulars.

Q. In what manner did the policy of Guy C. Phinney, number 422198, appear on the books of the company on the 12th day of September, 1893, as to whether it was a live, dead, or terminated policy?

A. This book of the company which I produce here has in it the following entries: Forfeited September 25th 1891. Do not restore, 2nd Vice-President; 28th March, 1892.

Thirtieth Exception.

The Court, in its charge to the jury, among others, gave the following instruction to the jury:

"It is a question of fact, therefore, for you to determine from the evidence in the case whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson with that understanding, and whether relying upon that understanding the defendant subsequently acted."

To which said instruction so given defendant, at the conclusion of the charge, and while the jury were still at the bar, duly excepted in writing, and its exception was duly allowed by the Court. All the evidence in this cause relating to the abandonment or rescission of the contract, and the surrender of the policy by the assured, was as stated in the twentieth and twenty-third exceptions herein.

The following is the charge of the Court to the jury, and the whole thereof:

"Gentlemen of the jury: This is an action to recover the amount claimed to be due upon a policy of insurance on the life of Guy C. Phinney. It is admitted by the pleadings that the defendant company issued the policy that is described in the complaint, and delivered it to Mr. Phinney, and received from Mr. Phinney the amount of $3770 as a first premium. The issuance and delivery of the policy, and receipt of the first premium,

put in force as an active and binding contract. So much is to be taken for granted in this case, because fully admitted by the pleadings of the parties.

"This contract provides that: 'In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay, at its home office in the city of New York, unto Guy C. Phinney of Seattle, in the county of King, State of Washington, his executors, administrators, or assigns one hundred thousand dollars upon acceptance of satisfactory proofs at its home office of the death of said Guy C. Phinney during the continuance of this policy upon the following conditions, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made a part of the contract.'

"Now, this, gentlemen, is a promise to pay to Mr. Phinney, as provided in other provisions of the contract, if he lives long enough to make the twenty annual payments, or in case of his death during the continuance of the policy to pay the amount of the insurance.

"The vital question in the case is whether the policy was a continuing one, and still a binding contract at the time of Mr. Phinney's death, and at the time of the receipt by the company of proof of Mr. Phinney's death.

"It is contended that the policy was not continuing as a live policy and binding contract at the time of Mr. Phinney's death on account of this provision of the policy:

" 'The annual premium of three thousand seven hun-

dred and seventy dollars shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, on the 24th day of September, in every year during the continuance of this contract, until premiums for twenty full years shall have been duly paid to said company.

" 'Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided.'

"It is claimed by the defendant that, by reason of the condition in the policy which I have read to you, and the failure of Mr. Phinney in his lifetime to make the payments which matured and became payable on the 24th day of September, 1891, and the 24th day of September, 1892, the policy lapsed, and the rights of Mr. Phinney under it were forfeited, so that it was not a continuing policy at the date of Mr. Phinney's death in 1893.

"Now, gentlemen, the law on this subject is this: These stipulations and provisions in the contract were controlled by positive statute of the State of New York. This policy was issued by a company doing business in

New York, and by its terms the company became obligated to perform its contract in the State of New York. Mr. Phinney agreed to make his payments in New York, and the company was entitled to have proof of the death of Mr. Phinney made at its home office in New York. The State of New York is the place for the performance of the contract, and as to the obligations of the parties with respect to performing the contract on both sides, the laws of the State of New York must be applied.

"The law of the State of New York, therefore, dominates and controls the provisions and stipulations which I have read. The statute of New York which I have referred to makes this provision with reference to the forfeiture of life insurance policies by insurance companies doing business in the State of New York for nonpayment of premiums:

"Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the persons to whom the same is payable, shall be duly addressed, and mailed to the person whose life is insured, or of the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, by an agent of such company or person appointed by it to collect such premiums. Such notice shall further state, that unless the said premium or interest, when due, shall be paid by the company, or to a duly appointed agent or other person authorized to col-

lect such premium, within thirty days after the mailing of such notice, the said policy and the payments thereon will become forfeited and void. In case the payments demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be a full compliance with the requirements of the policy in respect to the payment of said premium or interest; anything therein contained to the contrary notwithstanding. But no such policy shall, in any case, be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that the notice state when the premium would fall due, and that, if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least, thirty, and not more than sixty, days prior to the time when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"It is also a part of the provisions of the same statute, that life insurance companies doing business in New York shall not have power to forfeit any life insurance policy for nonpayment of premiums, unless they give this kind of a notice, and comply with this statute in regard to the mailing of the notice, either giving notice in advance of the due date of the premium at least thirty days, and not more than sixty days, before the date, or giving the notice afterwards, and allowing thirty days from the date of mailing the notice for the payment of the premium. Without a compliance with this requirement as to the mailing of notice, the laws of New York deprive the insurance company of the right to forfeit the

insurance policy. Compliance with this statute is an indispensable preliminary to the forfeiture for nonpayment of premiums, against the will and without the consent of the person insured. Strict compliance is required. If a notice does not contain the matters that the statute specifies must be in the notice, it is not a compliance, and the company would have no power to forfeit an insurance policy by reason of sending such defective notice. If a notice sent in advance or prior to the date when the premium is due is mailed twenty-nine days before that date, it is not of any such payment or tender of said premium by plaintiff a legal notice; it does not comply with the statute. If it should be sent sixty days before the date on which the premium is due it would not be a compliance with this statute.

"The rights of the insurance company under the terms of this policy and the statute of New York would be these:

"That the company would have a right to insist upon the payment of each annual premium on the date specified in the policy. They have a right by sending a notice to exact the payment on that date and to forfeit the policy and all premiums paid for nonpayment on that date. But in order to enjoy that right it is necessary that the statute of New York as to mailing the notice must be complied with. There is no proof in this case that the notice required by the statute of New York was ever sent to Mr. Phinney.

"Several defenses have been interposed by the defendant in the answer in this case, as to some of which no

evidence had been offered. You are not to understand by the failure of the defendant to offer evidence as to these defenses that they have been abandoned. In the preliminary stages of settling the issues of this case the Court has made rulings which preclude the defendant from claiming anything under these defenses; because the Court has held that they are insufficient in law to amount to a defense, and under those rulings evidence to sustain them, if offered here, would have been excluded.

"There remain in the case certain defenses which present an issue upon which evidence has been offered, and which require consideration at your hands, and as to which issues you are to decide. This case will turn upon your decision of the questions which I am now going to state to you. First, however, I will say that there has been a contention during the trial and upon the argument as to whether Mr. Phinney paid the second and third premiums. There is no evidence sufficient to warrant a finding that Mr. Phinney did pay any more than the first premium. There is positive evidence that he did not, and there is nothing to rebut that positive evidence that is of sufficient weight to justify the question being submitted to the jury. So you will not waste any time in debating that question. You will take it as a fact in the case that only one premium was paid.

"There has been a good deal of contention in the case as to whether Mr. Stinson was an agent of the company, and the extent of his powers. The pleadings of both parties show that the company had an agent in Seattle, and the proof shows that Mr. Stinson was that agent;

and there is no need of spending any time here debating the question whether Mr. Stinson was an agent of the company. The evidence shows that he was acting in behalf of the company, and the company transacted business through him, and he is to be treated throughout this case as a general agent of the company, having the usual powers of a general agent of a corporation existing under the laws of another State and doing business in this State.

"Now, it is contended that Mr. Phinney and this company, acting through Mr. Stinson as its agent, arrived at an understanding and agreement that the policy should not continue longer in force; Phinney was to pay no more money, and that his rights and the policy were abrogated. Notwithstanding the provision of the statute of New York, that a provision in the policy itself waiving notice has no effect, and that the company can only forfeit the policy for nonpayment of premium by mailing the prescribed notice, still it would be competent, and it was competent for the parties mutually to agree to the cancellation of a life insurance policy if they saw fit to do so. And if the evidence in this case shows that Mr. Phinney did voluntarily, without being induced by any false representations or deceit to give up the policy, rescind the contract and give up the policy rather than continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy so that it would no longer be a continuing contract. There is testimony in the case tending to prove that Mr. Phinney was unable to meet the second payment when it fell due,

and by reason of his failure to make that payment, he voluntarily delivered up the policy to Mr. Stinson as an agent of the company, with the understanding expressed at the time, that it was lapsed, that it was no longer a continuing contract in his favor. If there was a full and fair understanding between these two men in that matter, and they both treated it as an abrogated and annulled contract, and each relied upon that understanding, it would have the effect to terminate the policy, and the company would have the right to consider itself absolved from any obligation to give the statutory notice in order to forfeit the policy because it would be unnecessary for the company to forfeit by legal proceedings what the opposite party had voluntarily relinquished. It is a question of fact, therefore, for you to determine from the evidence in the case, whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson, with an understanding and whether relying upon that understanding the defendant company subsequently acted.

"You are the exclusive judges of every question of fact in the case. This important question is a question for you to decide. You are to be governed in deciding it by the testimony in the case. You have a right to base your decision upon any information derived from any other source than the testimony that has been admitted by the Court on the trial, and, so far as there is a conflict in the testimony, you are to aid and decide according to a preponderance of the evidence.

"There is an affirmative defense which the defendant makes, and to have the benefit of this defense, the defendant is required to make it out by proof and to sustain it by at least a fair preponderance of the evidence. The burden of proof as to that question is on the defendant. To have the benefit of this defense, it is necessary that the defendant shall prove to you by at least a fair preponderance of the evidence that there was this mutual agreement and understanding between Phinney and Stinson, and in acting in this matter, Stinson was acting in his capacity as agent of the company and in behalf of the company.

"If you find in favor of the defendant on that issue, your verdict will be for the defendant. If you find for the plaintiff on that issue, the plaintiff will be entitled to a verdict. If entitled to a verdict, the plaintiff will be entitled to an amount of one hundred thousand dollars, with interest on that amount at the rate of six per cent per annum, from the 19th day of July, 1894, after deducting from that amount the amount of unpaid premiums which accrued during Mr. Phinney's lifetime, and interest thereon. The company is entitled to these premiums, even if it has to pay under this policy; it is entitled to the premiums by reason of their nonpayment when due, and it is entitled to interest on the amount of these two premiums; so that if you find in favor of the plaintiff, you will allow the defendant credit for $3,770, and interest on that amount from the 24th day of September, 1891, until the 19th day of July, 1894, and I fixed that date, the 19th day of July, as the date when the company became obligated to pay; that is, the in-

surance money was due, if due at all, on that day, because that is the day that the evidence shows that the company first received information of Mr. Phinney's death; and the company would be entitled on that day to deduct the full amount of the unpaid premiums and interest upon that date. You will also allow a credit to be given for $3,770, and interest on that amount at the rate of six per cent per annum from the 24th day of September, 1892, until July 19, 1894. These two annual premiums, and the interest during the time they were withheld from the company, the company is entitled to take from the amount of its liability, if you find it is liable at all on this contract.

"I have prepared two forms of verdict, which I will send out, and you can use in accordance with your decision."

Thirty-first Exception.

At the conclusion of said charge, the jury retired and deliberated upon their verdict, and subsequently returned into Court for further instructions, and submitted to the Court a list of questions, among which are the following:

Q. If there is no evidence, pro or con, as to a legal notice being given, is the jury to consider this want of evidence as conclusive that no notice was given?

To which the Court answered "yes."

Whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the instruction given by the Court as embodied in said question and

answer, and its exception was duly allowed by the Court.

Thirty-second Exception.

Upon the return of the jury for further instruction, as stated in the thirty-first exception herein, among the list of questions submitted was the following:

Q. Is notice waived when the insured calls on the agent previous to the date of payment, and arranges, or tries to arrange, for the payment of the premium on the due date?

To which the Court answered "no."

Whereupon, and while the jury was still at the bar, defendant, in writing, duly excepted to the instruction given to the jury as embodied in said question and answer, and its exception was duly allowed by the Court.

Thirty-third Exception.

Upon the return of the jury for further instruction, as stated in the thirty-first exception herein, among the list of questions admitted was the following:

Q. Can this notice be waived by the acceptance of the policy?

Whereupon, and while the jury was still at the bar, defendant, in writing, duly excepted to the instruction given to the jury as embodied in said question and answer, and its exception was duly allowed by the Court.

Thirty-fourth Exception.

Upon the return of the jury for further instruction, as stated in the thirty-first exception herein, the following

was among the list of questions submitted by the jury to the Court:

Q. Did the company have the right to ask for a certificate of health, after the due date, from Mr. Phinney at the time he tendered payment of his second premium, according to the New York laws? If so, had they a right to refuse payment until such certificate of health was furnished?

To which question the Court answered "no."

Whereupon, and while the jury was still at the bar, defendant, by its counsel, duly excepted in writing to the instructions given to the jury as embodied in said question and answer, and its exception was duly allowed by the Court.

The questions set forth in the thirty-first, thirty-second, thirty-third, and thirty-fourth exceptions herein, were the only questions submitted by the jury to the Court, and the answers thereto, as stated in said exceptions thirty-one, thirty-two, thirty-three, and thirty-four, constitute the only response made by the Court in answer to said questions.

Exception Thirty-five.

After the Court had answered the questions set forth in exceptions thirty-one, thirty-two, thirty-three, and thirty-four, herein, as stated in said exceptions, and while the jury was still at the bar, defendant requested that the instructions embodied in said questions and answers be modified by a substantial repetition by the Court to the jury of the instructions which the Court

had theretofore given in regard to the abrogation of the contract by agreement between Stinson and Phinney, which request the Court refused, and refused to so modify said instructions, or to modify the same at all, to which refusal of the Court to so modify said instructions, defendant thereupon, and while the jury was still at the bar, duly excepted in writing, and its exception was allowed by the Court.

The jury then retired, and soon after returned with a verdict in favor of the plaintiff for damages in the sum of ninety-seven thousand twelve and 84-100 ($97,012.84) dollars.

And now, in furtherance of justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and pray that the same may be settled and allowed, and signed and certified by the Judge as provided by law.

E. LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Attorneys for Defendant.

Service of the above and foregoing Bill of Exceptions and receipt of a copy thereof, on this 14th day of September, 1895, is hereby admitted.

A. WARBURTON,
A. F. BURLEIGH,
Attorneys for Plaintiff.

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed, and settled, and made a part of the record herein.

Done in open Court, at the June term, 1895, and dated this 17th day of October, 1895.

C. H. HANFORD,
Judge.

[Endorsed]: Bill of Exceptions. Filed Sept. 14, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Settled as the Bill of Exceptions and filed Oct. 17, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

In the Circuit Court of the United States, for the District of Washington, Northern Division, Ninth Circuit.

NELLIE PHINNEY, as Executrix of the last Will and Testament of GUY C. PHINNEY, Deceased.
Plaintiff
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.
Defendant.
No. 418.

Petition for Order Allowing Writ of Error.

The Mutual Life Insurance Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment entered on the 17th day of October, 1895, pursuant to said verdict, whereby it was considered, ordered, and adjudged, that the plaintiff do have and recover of, and from said defendant, the sum of ninety-seven thousand twelve and 84-100 (97012.84)

dollars, with interest and costs, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition, comes now by Edward Lyman Short, Esquire, and Messrs. Strudwick & Peters, and Messrs Stratton, Lewis & Gilman, its attorneys, and prays said Court for an order allowing said defendant to prosecute the Writ of Error to the Honorable, The United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of errors so complained of, under and according to the laws of the United States, in that behalf made and provided; and also, that an order be made, fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that, upon the giving of said security, all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals for the Ninth Circuit; and the transcript of the record, proceedings, and papers in this cause duly authenticated, may be sent to the said United States Circuit Court of Appeals.

And your petitioner will ever pray.

EDWARD LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Attorneys for the Defendant,
The Mutual Life Insurance
Company of New York.

Dated this 14th day of December, 1895.

In the Circuit Court of the United States, for the District of Washington, Northern Division, Ninth Circuit.

NELLIE PHINNEY, as Executrix of the last Will and Testament of GUY C. PHINNEY, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
} No. 418.

Order Granting Writ of Error and Fixing Amount of Bond

This cause coming on this day to be heard in the courtroom of said Court, in the city of Seattle, Washington, upon the petition of the defendant, The Mutual Life Insurance Company of New York, herein filed, praying for the allowance of a writ of error, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with the assignment of errors also herein filed within due time, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow to said defendant the writ of error prayed for, and

It is ordered that upon the giving by said defendant,

The Mutual Life Insurance Company of New York, of a bond, according to law in the sum of one hundred and twenty-five thousand ($125,000) dollars, the same shall operate as a supersedeas bond, and all proceedings be stayed pending the determination of said writ of error.

C. H. HANFORD,
Judge.

Dated this 14th day of December, A. D. 1895.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased,
Defendant in Error.

Assignment of Errors.

Comes now the above-named, the Mutual Life Insurance Company of New York, plaintiff in error herein, by Edward Lyman Short, Esquire, and Messrs. Strudwick & Peters, and Messrs. Stratton, Lewis & Gilman, its attorneys and counsel, and, in connection with its petition for a Writ of Error herein, makes the following Assignment of Errors, and particularly specifies the following as the errors upon which it will rely and which it will urge upon the prosecution of its said Writ of Error

in the above-entitled cause, and which it avers occurred upon the trial of the cause, to wit.

I.

That the United States Circuit Court in and for the District of Washington, Northern Division, erred in sustaining the objection of counsel for defendant in error to the evidence of Dr. J. B. Eagleson, a witness called in behalf of plaintiff in error, and in rejecting the evidence of the said Dr. J. B. Eagleson, the full substance of which said evidence was as follows:

That subsequent to the date when the said Dr. Eagleson first examined the said Guy C. Phinney for insurance in said Mutual Life Insurance Company of New York application was made to him for a certificate of health on the part of Guy C. Phinney, and that the result of this application was communicated to said Phinney.

II.

The said Court erred in sustaining the objection of the defendant in error to the evidence of said Dr. J. B. Eagleson, and in rejecting the evidence of said Dr. J. B. Eagleson, the full substance of which said evidence was as follows:

That F. L. Stinson, general agent of said company for the State of Washington, after September, 1891, made an application to him, as medical examiner of said company, for a certificate of health for Guy C. Phinney, the result of which application was communicated to said Phinney.

III.

That said Court erred in overruling the objection of plaintiff in error to the evidence of A. B. Forbes, a witness called in rebuttal on behalf of defendant in error, and in permitting said witness to testify over said objection, the full substance of which said evidence was as follows:

"Q. Were you instructed or notified by the Mutual Life Insurance Company of New York not to accept the second premium on the Phinney policy, No. 422198 after September 24, 1891? A. I was."

IV.

That said Court erred in overruling the objection of plaintiff in error to the evidence of said A. B. Forbes, a witness called in rebuttal in behalf of the defendant in error, and in permitting the said witness to testify as follows over said objection, the full substance of which said evidence was as follows:

"Q. Did you give like notice and instruction to F. L. Stinson, or forward to him any such instructions and notice given by the company with reference to the Guy C. Phinney policy? A. I did."

V.

That said Court erred in overruling the objection of plaintiff in error to the introduction in evidence by the defendant in error of the letter marked Exhibit "K." and in admitting the same in evidence. The said letter is substance, as follows:

Seattle, Washington, Nov. 26th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

No. 114293 Curtis	No. 393675 Rogers
415957 Cushing	416309 Rice
418420 Calhoun	420062 Benson
441063 Raymore	441073 Patterson

September.

51342 Janney	270465 McKay
287091 O'Connor	307195 Mohr
373328 Finch	373530 Heaton
375371 Buttner	412636 Anderson
418608 Monroe	422198 Phinney offered to (pay, but h (ill health.
434207 Behrman	

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipts asked for) will be reported in next acct.

Yours, very truly,

F. L. STINSON."

VI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy ($3770) dollars should be paid by Guy C. Phin-

ney, the assured, annually on the 24th day of September, during the continuance of said contract, until premium for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney, died on September 12th, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract, the premium falling due on September 24, 1891, and by reason of said nonpayment of premium by said assured, the said policy became and was void and of no effect after said date, and you are directed to find a verdict for the defendant."

VII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance and upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof, that a premium of thirty-seven hundred and seventy ($3770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of said contracts until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said

premium by the assured at the time stipulated, was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney died on September 12th, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney, did not pay to the defendant, at the time mentioned in said contract, the premium falling due on September 24th, 1892, and by reason of said nonpayment of premium by said assured, the said policy became of no effect after said date, and you are directed to find a verdict for the defendant."

VIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy ($3770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of this contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893. The evidence of this cause establishes the fact that the assured, Guy C. Phin-

ney, did not pay nor tender to defendant, at the time stipulated in said contract, the premium falling due on September 24, 1892, and by reason of said nonpayment or tender of premium by said assured, the said policy became and was void and of no effect after said date; and you are directed to find a verdict for the defendant."

IX.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy ($3770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract, the premium falling due September 24, 1891, such nonpayment by the said assured, would render the said policy void and of no effect after said date. And

if you find the facts so to be, you will find a verdict for the defendant."

X.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy ($3770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in the contract the premium falling due September 24, 1892, your are instructed that said nonpayment by the said assured would render the said policy void, and of no effect after said date, and if you find the facts so to be you are directed to find a verdict for the defendant.'

XI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that it appears from the face of said policy, that it contained the folowing clause as one of the provisions and requirements, and conditions thereof: "Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived."

"And you are instructed that said waiver by the assured, Guy C. Phinney, of the sending of any notice required by any statute, was effectual and binding upon said assured, and is effectual and binding upon the plaintiff in this action; and that by reason of said waiver, it was not not incumbent upon the defendant, in order to declare or claim a forfeiture of said policy by reason of the nonpayment of premiums according to the terms of said policy, to send to the assured the notice mentioned and required by the laws of the State of New York for the year 1876, chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321, which is relied upon by the plaintiff, even if said statute were otherwise applicable to this contract."

"And you are further instruced by reason of said waiver, that failure to send statutory notice did not operate to prevent the forfeiture of said policy pursuant to its terms, by reason of the nonpayment of premiums falling due thereon, and if you find from the evidence, that Guy C. Phinney, the assured did not pay to defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find he

did not pay the premium falling due thereon September 24th, 1892."

XII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that it appears from the application, policy, and pleadings in this action, that Guy C. Phinney, the assured, was a resident of the State of Washington, and at all times therein mentioned, and that the application for said policy was signed by said Guy C. Phinney in said State; that said policy, with the application, which constituted a part thereof, completely set forth the contract between the defendant and the assured."

"You are further instructed that said application provides that said policy 'shall not take effect until the first premium shall have been paid, and the policy shall have been delivered."

"You are further instructed that it appears from said pleadings that the first premium upon said policy was paid in Seattle, Washingon, and that said policy was, by defendant, delivered to assured at the same place.

"You are therefore further instructed that the policy sued upon in this action never became a complete contract, binding upon either party to it, until the delivery of the policy and the payment of the first premium in the State of Washington; and that said policy is, therefore, a Washington contract, and is governed by the laws of said State of Washington, and not by the laws of the

State of New York. And that the law of New York hereinbefore referred to, and relied upon by plaintiff, is not applicable to and does not govern this contract. And if you find from the evidence that Guy C. Phinney, the assured, did not pay to defendant the premium falling due upon said policy, according to its terms, September 24th, 1891, your verdict should be for the defendant; and the same would be the result if you find he did not pay the premium falling due thereon September 24, 1892."

XIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death on September 12th, 1893.

"And you are further instructed that the plaintiff, executrix, was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant."

XIV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death, on September 12th, 1893.

"And you are further instructed that the plaintiff, executrix, was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant."

XV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death, on September 12th, 1893, then you are instructed that the plaintiff, executrix, is not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past due premium. If you find from the evidence that said premium was still unpaid, and that the amount thereof had never been tendered by the plaintiff to the defendant prior to the beginning of this action, your verdict should be for the defendant."

XVI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death, on September 12th, 1893, then you are instructed that the plaintiff, executrix, is not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past due premium. If you find from the evidence that said premium was still unpaid, and the amount thereof has never been tendered by the plaintiff to the defendant prior to the beginning of this action, your verdict should be for the defendant."

XVII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that no waiver of the payment of the due premium, or of its tender, can avail the plaintiff, unless such waiver, with all the facts alleged to constitute the same, are alleged in the complaint of the plaintiff, or in her reply; and there being no such facts pleaded, no evidence on such points can be considered by you, notwithstanding the statute of New York of 1876 and 1877, relied upon by the plaintiff, and there being

no testimony of such fact, you are instructed to find a verdict for the defendant."

XVIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The plaintiff in her complaint in this action alleges performances of the conditions of the policy sued on, on her part, and on the part of Guy C. Phinney. I charge you that under the said contract one of the conditions to be performed by the said Guy C. Phinney was the payment of the premiums falling due on September 24, 1891, and September 24, 1892; and the plaintiff cannot recover in this action without establishing the allegations of her complaint, performance under such contract, namely, the payment of said premiums, and if you find from the evidence in this action that the premium of 1891 or the premium of 1892 was not paid by said Guy C. Phinney, then your verdict must be for the defendant."

XIX.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that the said statute of New York for 1876 is local in its nature, and applies only to assured or their assigns residing in the State of New York; and that the said statute has no application to and does not govern the contract sued upon in this action; and if you further find from the evidence that the assured, Guy C.

Phinney, failed to pay either the premium maturing September 24, 1891, or the premium maturing September 24, 1892, then you are directed to find a verdict for the defendant."

XX.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are further instructed that said law of New York hereinbefore referred to, and which is relied upon by plaintiff, in so far as it is attempted to be construed to impose the duty of sending notices to residents outside of the State of New York, in connection with policies which became completed contracts, either within or without the State of New York, and in so far as it may be construed not to permit any waiver of sending such notices by contract between the parties thereto, is invalid, for the reason that it is in violation of and repugnant to the Constitution of the United States, because said statute so construed would be a denial to this defendant by the States of New York and Washington of the equal protection of their laws, and would be a deprivation by said States of the property of defendant without due process of law, and would be a regulation of commerce in the several States, and would be interfering with the sovereignty of the State of Washington, and would affect property and business without the jurisdiction of the State of New York; and because said law so construed violates the Constitution of the United States in that it is a law impairing the obligation of contracts, and, under the rights, titles, and privileges and

immunities which belong to the defendant under the Constitution of the United Sates, it was not obliged to send notices to the assured under this policy.

"And if you find from the evidence that Guy C. Phinney, the assured, did not pay to the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the case if you find that he did not pay the premium falling due upon the policy September 24, 1892."

XXI.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"Notwithstanding the requirements of the statute of New York that notices in a particular form and at a time prescribed shall be sent by life insurance companies before they shall have power to declare a policy of life insurance forfeited, yet if the jury finds from the evidence that the defendant sent a notice to the said Guy C. Phinney, although said notice was not in the form, nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said premium, came to the representative of the company, and requested further time in which to pay said premium, and such extension of time was refused by said representative, and the said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and

that said premium was not paid, nor tendered by, or on behalf of, said Phinney at its maturity, then you are invalid notice; and a waiver on the part of said Phinney of and of the representative of the company, would constitute a recognition by said Phinney of the notice sent as a valid notice; and a waiver on the part of said Phiney of the notices in the form, and at the same time required by the New York statute, if the same were otherwise applicable. If you so find the facts to be, you must find a verdict for the defendant."

XXII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"Notwithstanding the requirements of the statute of New York that notices in a particular form and at the time prescribed shall be sent by life insurance companies before they shall have power to decare a policy of life insurance forfeited, yet if the jury find from the evidence that the defendant sent a notice to the said Guy C. Phinney, although such notice was not in the form, nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said premium, came to the representative of the company, and requested further time in which to pay said premium, and such extension of time was refused by said representative, and said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and

that said premium was not paid, nor tendered by, or on behalf of said Phinney at its maturity, then you are instructed that such notice so sent and acted upon would constitute a sufficient compliance with the provisions of the statute of New York, in regard to the sending of notice, although the said notice was not in the form prescribed, nor at the time required by said statute; and if you find the facts so to be, you are directed to find a verdict for the defendant."

XXIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the said Phinney did not pay the premium falling due September 24, 1891, and by his subsequent course led the defendant to believe that he considered his policy forfeited, and that he no longer relied thereon, as a binding contract, and that he had abandoned the same, then his executrix would be estopped from now asserting the validity of said policy in this action; and if you find the facts so to be, you will find a verdict for the defendant."

XXIV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence that said Phinney did not pay or tender the premium falling due on September 24, 1891, and that his course of conduct with the defend-

ant prior to his death, and the course of dealing with the defendant of the plaintiff subsequent to his death, are inconsistent with the idea that they or either of them relied upon the policy as a valid contract, and such as to lead the defendant to believe that no reliance was placed by them in said policy as a valid contract, and that the same had been abandoned, the plaintiff would be estopped from now asserting the validity of said contract, and if you so find the facts to be, you must find a verdict for the defendant."

XXV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence that the said Guy C. Phinney stated to defendant's representatives in the State of Washington, that he could not pay his premium falling due on the 24th day of September, 1891, it was equivalent to his saying that he could not go on with the contract, and that he abandoned the same, and if you find that the defendant assented thereto, then this would end the contract; and if you so find the facts to be, you must find a verdict for the defendant."

XXVI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case, that the said Guy C. Phinney stated to the representative of the

defendant in the State of Washington, that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representatives, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the nonpayment of the said premium, this would constitute an abandonment and rescission of this contract by both parties thereto, and would put an end to the same; and if you find the facts so to be, you must find a verdict for the defendant."

XXVII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The statute of New York relied upon by the plaintiff, relieves against a forfeiture without the sending of a proper notice in a single instance only, it does not contemplate successive defaults, nor does it in a particular case relieve the assured of more than one default. The assured cannot go on, year after year, without the payment of premiums, and have his policy still kept alive by the statute, and if successive defaults occur the policy is forfeited, notwithstanding the provisions of the law of New York of 1876 and 1877, and only in a proper case, the policy holder is entitled to the benefit of the Act of New York of 1879 relating to the surrender value of policies forfeited.

"And if you find from the evidence that Guy C. Phin-

ney did not pay the premium of 1892, you must find a verdict for the defendant."

XXVIII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"Upon all the evidence in this case, you are instructed to find a verdict in favor of the defendant."

XXIX.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"It is contended that the policy was not continuing as a live policy and binding contract at the time of Mr. Phinney's death, on account of this provision in the policy:

"The annual premium of three thousand seven hundred and seventy dollars shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office, in the city of New York, and on the 24th day of September in every year during the continuance of this contract until premuims for twenty (20) full years shall have been duly paid to said company.

"Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the de-

livery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. If this policy shall become void by nonpayment of premiums, all payments previously made shall be forfeited to the company, except as hereinafter provided.

"It is claimed by the defendant that, by reason of the conditions in the policy which I have read to you, and the failure of Mr. Phinney in his lifetime to make the payments which matured and became payable on the 24th day of September, 1891, and the 24th day of September, 1892, the policy lapsed, and the rights of Mr. Phinney under it were forfeited, so that it was not a continuing policy at the date of Mr. Phinney's death, in 1893.

"Now, gentlemen, the law on this subject is this: These stipulations and provisions in the contract are controlled by positive statute of the State of New York. This policy was issued by a company doing business in New York, and by its terms the company became obligated to perform its contract in the State of New York. Mr. Phinney agreed to make his payments in New York, and the company was entitled to have proof of the death of Mr. Phinney made at its home office in New York. The State of New York is the place for the performance of the contract, and, as to the obligations of the parties with respect to the performing the contract on both sides, the laws of the State of New York must be applied.

"The law of the State of New York, therefore, dominates and controls the provisions and stipulations which I have read. The statute of New York which I have re-

ferred to make this provision, with reference to the forfeiture of life insurance policies by insurance companies doing business in the State of New York, for nonpayment of premiums:

"Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premiums or interest shall be paid, and the persons to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or of the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest, when due, shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and the payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be a full compliance with the requirements of the policy in respect to the payment of the said premium or interest, anything therein contained to the contrary notwithstanding. But no such policy shall in any case be forfeited, or declared forfeited, or lapsed until the expiration of thirty days after the mailing of such notice; provided, however, that the notice state when the premium will fall due, and that, if not paid, the policy

and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty, and not more than sixty, days prior to the time when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"It is also a part of the provisions of the same statute that life insurance companies doing business in New York shall not have power to forfeit any life insurance policy for nonpayment of premiums, unless they give this kind of a notice and comply with this statute in regard to the mailing of the notice, either giving notice in advance of the due date of the premium at least thirty days, and not more than sixty days, and not more than sixty days before the date, or giving the notice afterwards and allowing thirty days from the date of mailing the notice for the payment of the premium. Without a compliance with this requirement, after the mailing of notice, the laws of New York deprive the insurance company of the power to forfeit the insurance policy. Compliance with this statute is an indispensable preliminary to the forfeiture for nonpayment of premiums against the will and without the consent of the person insured. Strict compliance is required. If a notice does not contain the matters that the statute specifies must be in the notice, it is not a compliance, and the company would have no power to forfeit an insurance policy by reason of sending such defective notice. If a notice sent in advance or prior to the date when the premium is due is mailed twenty-nine days before that date, it is not a legal notice, it does not comply with the statute. If it

should be sent sixty-one days before the date on which the premium is due, it would not be a compliance with the statute.

The rights of the insurance company under the terms of this policy and statute of New York would be these: That the company would have a right to insist upon the payment of each annual premium on the date specified in the policy. They have a right, by sending a notice, to exact the payment on that date, and to forfeit the policy and all premiums paid for nonpayment on that date. But in order to enjoy that right it is necessary that the statute of New York, as to mailing the notice, must be complied with. There is no proof in this case that the notice required by the statute of New York was ever sent to Mr. Phinney.

XXX.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"If the evidence in this case shows that Mr. Phinney did voluntarily, without being induced by false representations or deceit, rescind the contract and give up the policy rather than continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy, so that it would no longer be a continuing contract."

XXXI.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"It is a question of fact, therefore, for you to determine from the evidence in the case whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson with that understanding, and whether, relying upon that understanding, the defendant subsequently acted."

XXXII.

That said Court erred in giving the following instruction to the jury, after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (By the Jury.) If there is no evidence pro or con, as to a legal notice being given, is the jury to consider this want of evidence as conclusive that no notice was given?

A. (By the Court.) Yes."

XXXIII.

That said Court erred in giving the following instruction to the jury, after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (By the Jury.) Is notice waived when the insured calls on the agent previous to the date of payment, and arranges, or tries to arrange, for the payment of the premium on the due date?

A. (By the Court.) No."

XXXIV.

That the said Court erred in giving the following instruction to the jury, after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (By the Jury.) Can this notice be waived by the acceptance of the policy?

A. (By the Court.) No."

XXXV.

That said Court erred in giving the following instruction to the jury, after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (By the Jury.) Did the company have a right to ask for a certificate of health, after the due date, from Mr. Phinney, at the time he tendered payment of his second premium according to the New York laws? If so, had they a right to refuse payment until such certificate of health was furnished?

A. (By the Court.) No."

XXXVI.

That said Court erred in refusing the request of plaintiff in error to modify the instructions embodied in the questions and answers shown in the assignments of error numbered XXXII, XXXIII, XXXIV, and XXXV, by substantial repetition by the Court to the jury of the instruction, which the Court had theretofore given in re-

gard to the abrogation of the contract of insurance, by agreement between the agent of the company and the assured.

XXXVII.

That the said Court erred in refusing to grant the motion made by plaintiff in error to the rendition of judgment in said cause, which motion was as follows, to wit:

"Comes now the defendant in the above-entitled action, and moves the Court as follows:

1.

That the judgment in the above-entitled action be arrested, and that the Court refuse to enter judgment on the verdict herein, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof, or of the parties to said action.

2.

That the Court dismiss the above-entitled action, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof, or of the parties to said action.

3.

That the Court will render judgment in favor of the defendant, and against the plaintiff, for the dismissal of this action, notwithstanding the verdict herein, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court

has no jurisdiction thereof, or of the parties to said action.

This motion is based upon the files, records, and proceedings of this Court in the above-entitled cause, and upon all the testimony and evidence introduced upon the trial thereof."

XXXVIII.

That said Court erred in refusing to grant the motion made by plaintiff in error for a new trial of said cause.

XXXIX.

That said Court erred in rendering and giving that certain judgment in said cause, made and entered on the 17th day of October, 1895, whereby it was ordered and adjudged by said Court that said Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased, do have and recover of the Mutual Life Insurance Company of New York the sum of ninety-seven thousand twelve and 84-100 ($97,012.84) dollars, with interest and costs.

Wherefore, The said The Mutual Life Insurance Company of New York, plaintiff in error, prays that the said judgment of the Circuit Court of the United States for the District of Washington, Northern Division, be reversed, and that said Court be directed to grant a new trial of said cause.

EDWARD LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,

Attorneys for Plaintiff in Error, The Mutual Life Insurance Company of New York, Defendant in the Lower Court.

In the Circuit Court of the United States, for the District of Washington, Northern Division, Ninth Circuit.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased.
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
} No. 418.

Bond on Writ of Error.

Know all Men by These Presents: That the Mutual Life Insurance Company of New York, defendant above named, as principal, and C. C. Neufelder, James R. Hayden, S. Frauenthal, and John Leary, all of Seattle, Washington, as sureties, are held and firmly bound unto Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased, plaintiff above named, in the full and just sum of one hundred and twenty-five thousand ($125,000) dollars, to be paid to the said plaintiff, her attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 14th day of December, 1895.

The condition of the above obligation is such,

That whereas, lately, at a session of the Circuit Court

of the United States, for the District of Washington, Northern Division, in a suit pending in said Court, between the said Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased, as plaintiff, and The Mutual Life Insurance Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, as defendant, a final judgment was rendered against the said defendant in the sum of ninety-seven thousand twelve and 84-100 ($97,012.84) dollars, with interest and costs;

And whereas, the said defendant has obtained from the said Court, a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff is about to be issued, citing and admonishing her to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit to be held at San Francisco, in the State of California.

Now, therefore, if the said, The Mutual Life Insurance Company of New York, shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation is to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, [Seal]
By Abraham M. Engle, Agent.
E. C. NEUFELDER, [Seal]
JAMES R. HAYDEN, [Seal]
S. FRAUENTHAL, [Seal]
JOHN LEARY. [Seal]

United States of America,
District of Washington, Northern Division, } ss.
King County.

E. C. Neufelder, James R. Hayden, S. Frauenthal, and John Leary, sureties in the foregoing bond, being each duly sworn, each for himself deposes and says:

That he is a freeholder in said district, and the said E. C. Neufelder, that he is worth the sum of seventy-five thousand dollars ($75,000) dollars; and the said S. Frauenthal that he is worth the sum of fifty thousand dollars ($50,000) dollars; and the said James R. Hayden that he is worth the sum of ten thousand dollars ($10,000) dollars; and the said John Leary that he is worth the sum of fifty thousand dollars ($50,000.00) dollars, all exclusive of property exempt from execution, and over and above all debts and liabilities.

E. C. NEUFELDER,
JAS. R. HAYDEN,
S. FRAUENTHAL,
JOHN LEARY,

Subscribed and sworn to before me this 14th day of December, 1895.

[Seal] R. V. ANKENY,
Notary Public in and for the State of Washington, Residing at Seattle.

The sufficiency of the sureties of the foregoing bond approved by me this 14 day of December, 1895.

C. H. HANFORD, Judge.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased,
Defendant in Error.

No. 418.

United States of America, Ninth Judicial Circuit. } ss.

Citation. (COPY.)

The President of the United States, To Nellie Phinney, as Executrix of the Last Will and testament of Guy C. Phinney, Deceased, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 11th day of January, 1896, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern Division, in that certain action wherein The Mutual Life Insurance Company of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said

Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of December, in the year of our Lord, eighteen hundred and ninety-five, and of the Independence of the United States, the one hundred and twentieth.

C. H. HANFORD,

United States District Judge, sitting as U. S. Circuit Judge, Ninth Circuit, District of Washington.

Service of the within citation and receipt of a copy thereof admitted this 14th day of Dec., 1895.

S. WARBURTON,

A. F. BURLEIGH,

Attorneys and Counsel for Nellie Phinney, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the last Will and Testament of GUY C. PHINNEY, Deceased.
Plaintiff
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.
Defendant.
} No. 418.

Northern Division, King County.
District of Washington,
United States of America,
} ss.

Marshal's Return to Citation.

I, James C. Drake, United States Marshal, for the District of Washington, do hereby certify that I received the annexed citation on the 14th day of December, A. D. 1895, and on the same day duly served the same upon Nellie Phinney, executrix of the last will and testament of Guy C. Phinney, deceased, by delivering to and leaving with said Nellie Phinney, executrix of the last will and testament of Guy C. Phinney, deceased, personally, in King County, District of Washington, Northern Division, a full, true, and correct copy of said citation, certified to by the clerk of the Circuit Court of the District of Washington, Northern Division, under the seal of said court, to be a correct copy of said citation.

Witness my hand, this 18th day of December, A. D. 1895.

JAMES C. DRAKE,
United States Marshal for the District of Washington.
By James M. Quilter, Deputy.

Marshal's fees, $4.24-100.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased,
Defendant in Error.
} No. —

United States of America,
Ninth Circuit.
} ss.

Writ of Error. (COPY)

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States, for the District of Washington, Northern Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the Mutual Life Insurance Company of New York, defendant and plaintiff in error, and Nellie Phinney, as execu-

trix of the last will and testament of Guy C. Phinney, deceased, plaintiff and defendant in error, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at the city of San Francisco, in the State of California, on the 11th day of January next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of December, 1895, and of the Independence of the United States, the one hundred and twentieth.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.
[Seal Circuit Court] By R. M. Hopkins, Deputy Clerk.

Allowed: C. H. HANFORD, Judge.

Dated this 14th day of December, 1895.

Received a true copy of the foregoing Writ of Error for defendant in error.

Dated this 14th day of December, 1895.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.
By R. M. Hopkins, Deputy Clerk.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 418.

United States of America, District of Washington, } ss.

Clerk's Certificate to Transcript.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, do hereby certify the foregoing three hundred and forty-seven (347) written and printed pages, numbered from one (1) to three hundred and forty-seven (347), inclusive, to be a full, true, and correct copy of the record, papers, and all proceedings had in the foregoing

entitled cause, as the same remains of record and on file in the office of the clerk of said Circuit Court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of preparing and certifying the foregoing transcript of record is the sum of two hundred and eleven & 70-100 dollars ($211.70), and that the same has been paid to me by Strudwick & Peters, attorneys for the plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 4th day of January, A. D. 1896.

[Seal] A. REEVES AYRES,

Clerk of the United States Circuit Court, District of Washington. By R. M. Hopkins,

Deputy Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased.
Defendant in Error.

No. —

United States of America, Ninth Circuit. } ss.

Writ of Error. (ORIGINAL)

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the District of Washington, Northern Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the Mutual Life Insurance Company of New York, defendant and plaintiff in error, and Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased, plaintiff and defendant in error, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should

be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the city of San Francisco, in the State of California, on the 11th day of January next, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of th United States, this 14th day of December, 1895, and of the Independence of the United States, the one hundred and twentieth.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.

By R. M. Hopkins,
Deputy Clerk.

Allowed by

C. H. HANFORD,
Judge.

Dated this 14th day of December, 1895.

Received a true copy of the foregoing Writ of Error for defendant in error.

Dated this 14th day Dec., 1895.

A. REEVES AYRES,

Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.

By R. M. Hopkins,

Deputy Clerk.

[Endorsed]: No. 418. In the United States Circuit Court, for the District of Washington. Nellie Phinney, as Executrix of the Estate of Guy C. Phinney, Plaintiff, vs. The Mutual Life Insurance Company of New York. Writ of Error. Edward Lyman Short, Strudwick and Peters, Stratton, Lewis and Gilman, Attorneys for Defendant.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased.
Defendant in Error.

United States of America, Ninth Judicial Circuit. } ss.

Citation. (ORIGINAL)

The President of the United States, to Nellie Phinney, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 11th day of January, 1896, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern Division, in that certain action wherein The Mutual Life Insurance Company of New York is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of December, in the year of our Lord, eighteen hundred and ninty-five, and of the independence of the United States, the one hundred and twentieth.

C. H. HANFORD,

United States District Judge, sitting as U. S. Circuit Judge, Ninth Circuit, District of Washington.

Service of the within citation and receipt of a copy thereof admitted, this 14th day of Dec., 1895.

S. WARBURTON,

A. F. BURLEIGH,

Atorneys and counsel for Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased.
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
} No. —

United States of America,
District of Washington, Northern Division,
King County.
} ss.

Marshal's Return to Citation.

I, James C. Drake, United States Marshal for the District of Washington, do hereby certify that I received the annexed citation on the 14th day of December, A. D. 1895, and on the same day duly served the same upon Nellie Phinney, executrix of the last will and testament of Guy C. Phinney, deceased, by delivering to and leaving with said Nellie Phinney, executrix of the last will and testament of Guy C. Phinney, deceased, personally, in King County, District of Washington, Northern Division, a full, true and correct copy of said citation, certified to by the clerk of the Circuit Court of the District of Washington, Northern Division, under the seal of said court, to be a correct copy of said citation.

Witness my hand this 18th day of December, A. D. 1895.

JAMES C. DRAKE,
United States Marshal for the District of Washington.
By James M. Quilter, Deputy.

Marshal's fees, $4.24.

[Endorsed]: Original. No. 418. In the United States Circuit Court for the District of Washington. Nellie Phinney, as Executrix, v. The Mutual Life Insurance Company of New York. Citation.

EDWARD LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Attorneys for Defendant.

[Endorsed]: No. 274. United States Circuit Court of Appeals for the Ninth Circuit. Transcript of Record. In error to the United States Circuit Court for the District of Washington, Northern Division. The Mutual Life Insurance Company of New York, Plaintiff in Error, v. Nellie Phinney, Executrix of the Estate of Guy C. Phinney, deceased, Defendant in Error.

Filed January 7th, 1896.

F. D. MONCKTON,
Clerk.

PROCEEDINGS

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

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United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
vs.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, Deceased.
No. 274.

Motion to Dismiss.

Comes now the defendant in error, by her counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for manifest, manifold irregularities and informalities in the papers and proceedings in error, viz., because:

1. There is no technical nor proper return to said writ of error.

2. Neither the petition for the writ of error, nor the assignment of errors, nor the order granting writ of error and fixing amount of bond, nor the bond upon said writ of error, nor the citation upon said writ of error, was filed with the clerk of the Court below.

And the said defendant in error, by counsel as aforesaid, also moves the Court to dismiss the writ of error in the above-entitled cause for want of jurisdiction, because:

1. No proper or legal citation on said writ of error was issued or served; and

2. Said writ of error was not filed in the court below.

This motion will be made upon the record herein.

S. WARBURTON,

Of Counsel for Defendant in Error.

LORENZO S. B. SAWYER,

Counsel for Defendant in Error for the purposes of these motions.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, Deceased. } No. 274.

To Edward Lyman Short, Strudwick & Peters, Stratton, Lewis & Gilman, Esquires, Counsel for Plaintiff in Error:

Please take notice that on Monday, the 4th day of May, 1896, at the opening of the court, or as soon thereafter as counsel can be heard, at the courtroom of said court, in the city and county of San Francisco, State of California, the motions of which the foregoing are copies will be ar-

gued and submitted to the United States Circuit Court of Appeals for the Ninth Circuit, for the decision of the said Court thereon.

S. WARBURTON,
Of Counsel for Def. in Error.
LORENZO S. B. SAWYER,
Counsel for the Defendant in Error for the purposes of the motions.

[Endorsed]: Motion to Dismiss. Received copy of the within this April 3, 1896. Strudwick & Peters, Atty. for Appellant. Filed May 4, 1896. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased,
Defendant in Error.
No. 274.

Motion for Leave to Amend the Certificate and Return of the Clerk of the Circuit Court.

Comes now the Mutual Life Insurance Company of New York, the plaintiff in error herein, and hereby

moves the Court for an order, directing the clerk of the Circuit Court of the United States for the District of Washington, Northern Division, to amend his return to the writ of error herein and certificate to the transcript of the record, so that the same shall in all respects conform to the statutes and rules of this Court, in such case made and provided.

This motion is based upon the files and records in this Court in this cause, and upon the affidavit of R. M. Hopkins filed herewith.

E. LYMAN SHORT,
STRATTON, LEWIS & GILMAN,
STRUDWICK & PETERS,
Attorneys for Plaintiff in Error.

[Endorsed]: Motion for Leave to Amend the Certificate and Return of Clerk. Filed May 4, 1896. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased,
Defendant in Error.
No. 274.

United States of America,
District of Washington,
Northern Division,
ss.

Affidavit of R. M. Hopkins.

R. M. Hopkins, being first duly sworn, upon his oath says:

I am a deputy clerk of the Circuit Court of the United States for the District of Washington; that A. Reeves Ayres, Esquire, is the clerk of said Court; that said A. Reeves Ayres has his permanent residence in the city of Tacoma, in the Western Division of said District of Washington; that for more than five years last past I have been, and am now, as such deputy clerk, in sole charge and control of the office of said clerk, in the northern division of said district, and as such deputy perform all of the duties of clerk of the Circuit Court in said division.

That I, as such deputy, made the return to the writ of error herein, and the certificate appearing on pages 400 and 401 of the printed record herein; that said certificate is in the form uniformly used by me for five years last past in making returns to writs of error.

That, as a matter of fact, the transcript constituting the return made by me to the writ of error herein, contains everything prescribed by the statutes of the United States and the rules of this Court to be contained in returns to writs of error, to-wit:

An authenticated transcript of the record, the assignment of errors, and a prayer for reversal with a citation to the defendant in error; also a true copy of the record, opinion of the Court, the bill of exceptions, assignment of erorrs, and all proceedings in the cause.

That should this Honorable Court deem the certificate made by me, as deputy aforesaid, in any way insufficient or informal, I desire leave to correct the same, and make, as deputy aforesaid, and have attached to said record, a new certificate in accordance with the facts, as stated by me in this affidavit, and the requirements which this Honorable Court may make.

That for such purpose I have made and delivered to the attorney for the plaintiff in error herein an amended certificate, which I request, in case my former certificate be found insufficient, may be attached to the record sent up herein as a return to the writ of error.

R. M. HOPKINS.

Subscribed and sworn to before me this 28th day of April, A. D. 1896.

[Seal] W. PARRY SMITH,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Affidavit of R. M. Hopkins. Filed May 4, 1896. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased,
Defendant in Error.
No. 274.

United States of America,
District of Washington,
Northern Division,
King County,
ss.

Affidavit of R. M. Hopkins.

R. M. Hopkins, being first duly sworn, upon his oath says:

I am a deputy clerk of the United States Circuit Court for the District of Washington, Northern Division; that

A. Reeves Ayres, Esquire, is the clerk of said court; that as such deputy clerk I have sole control, supervision, and management of said clerk's office in the Northern Division in the District of Washington, said office being situate in the city of Seattle, in said division.

That the writ of error herein was sued out on the 14th day of December, 1895, at which time I was in control of said clerk's office as aforesaid, as such deputy; that at the time said writ of error was sued out the following proceedings were had, and matters and things transpired as I now relate them, to-wit:

Messrs. R. C. Strudwick and L. C. Gilman, attorneys for the plaintiff in error, presented to me in my office the petition for order allowing writ of error, a copy of which appears on pages 360 and 361 of the printed record herein, and therewith the assignment of errors, a copy of which appears in the printed record from pages 363 to 391 inclusive, and the aforesaid papers were, at said time, by the persons aforesaid delivered to and lodged and filed with me as such deputy clerk, and I then and there indorsed the same as filed.

That within a very few minutes thereafter the aforesaid attorneys presented to me at my office aforesaid the order granting writ of error, and fixing the amount of bond, a copy of which appears at pages 362 and 363 of the printed record herein, which said order at said time had been signed by the Honorable C. H. Hanford, Judge of said court; and also the bond, a copy of which appears in the printed record, at pages 392 to 394, inclusive, which at said time has been approved by the before mentioned

Judge. The said attorneys at said time delivered to and filed and lodged with me said papers, and each of them, and I then and there indorsed the same as filed by me on said day.

That said petition, assignment of errors, order granting writ of error, and fixing the amount of bond, and said bond, are each and all now on file in my said office, and they and each of them bear the following indorsement:

"Filed December 14th, 1895. In the U. S. Circuit Court. A. Reeves Ayres Clerk. By R. M. Hopkins, Deputy Clerk."

That if said indorsements do not appear in the copy of the record returned by me, with the writ of error herein, it is due solely to my own inadvertence in copying the same.

That immediately upon the filing of said order and bond, I, at the request of said attorneys, issued the writ of error herein, a copy of which appears in the printed record at pages 398 and 399, and delivered said writ to R. C. Strudwick, one of said attorneys, who took the same from my office.

That a few minutes thereafter the said Strudwick returned to my office, and delivered to and lodged and filed with me, said writ of error, with the allowance thereof indorsed thereon by the before mentioned Judge, and at the same time delivered to and lodged and filed with me a copy of said writ for the use of defendant in error.

That said original writ of error remained in my office and in my custody from said 14th day of December, 1895,

until the 4th day of January, 1896, at which time I transmitted the same, with my return thereto, to this Honorable Court.

That the original citation herein, a copy of which appears on pages 395 and 396 of the printed record herein, was returned to and filed with me by a deputy marshal of the United States for the District of Washington, on the 18th day of December, 1895, and the same remained in my office and in my custody and control from said date until the same was transmitted to this Honorable Court, together with the writ of error and return thereto on the 4th day of January, 1896. It has not been my custom to indorse original citations and writs of error at the time they are filed with or served upon me, for the reason that I have deemed the same as writs of the Circuit Court of Appeals to be indorsed by the clerk of said Court upon his receipt of the same with my return thereto; but, as a matter of fact, the writ of error and citation herein were actually delivered to and filed and lodged with me as above stated.

R. M. HOPKINS.

Subscribed and sworn to before me this 28th day of April, A. D. 1896.

[Seal] W. PARRY SMITH,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Affidavit of R. M. Hopkins. Filed May 4, 1896. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the last Will and Testament of GUY C. PHINNEY, Deceased.
Defendant in Error.
No. 274.

United States of America,
District of Washington,
Northern Division,
King County.
ss.

Affidavit of James M. Quilter.

James M. Quilter, being first duly sworn, upon his oath says:

I am, and was at all times herein mentioned, a deputy United States Marshal, for the District of Washington.

That on the 14th day of December, A. D. 1895, R. C. Strudwick, one of the attorneys for the plaintiff in error herein, delivered to me for service the citation herein, a copy of which appears on pages 395 and 396 of the printed record, with instructions to make service thereof upon defendant in error, and return the same to the clerk's office of the Circuit Court of the United States for the District of Washington, Northern Division.

That I served said citation on the same day it was delivered to me, as appears by the return made by me, a copy of which appears in the printed record herein at pages 397 and 398.

That on the 18th day of December, 1895, I returned said citation, by delivering to and lodging and filing the same with said clerk in his office, in the city of Seattle, with my return attached thereto.

JAMES M. QUILTER.

Subscribed and sworn to before me this 28th day of April, 1896.

[Seal] W. PARRY SMITH,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Affidavit of James M. Quilter. Filed May 4, 1896. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth District.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased,
Defendant in Error.
No. 274.

United States of America,
District of Washington,
Northern Division,
King County.
ss.

Affidavit of R. C. Strudwick.

R. C. Strudwick, being first duly sworn, upon his oath says:

I am one of the attorneys for the plaintiff in error in the above-entitled cause; that I have been continuously the attorney for the plaintiff in error in said cause from the time the same was commenced in the Circuit Court of the United States for the District of Washington, Northern Division, up to and including the present time, and at all said times have been actively engaged in the management and control of said cause.

That at the time the writ of error was sued out herein, to-wit, on the 14th day of December, A. D. 1895, the following facts occurred and proceedings were had in the Circuit Court of the United States, for the District of Washington, Northern Division, as I now state them, to-wit:

On said day, acompanied by L. C. Gilman, Esquire, one of my associate counsel, in said cause, I went to the office of the clerk of said court, and there delivered to and filed with R. M. Hopkins, the duly appointed and constituted deputy clerk of said court, the petition for order allowing writ of error, a copy of which appears on pages 360 and 361 of the printed record herein, and with said petition I also delivered to and filed with said clerk the assignment of errors, a copy of which appears in the printed record herein, from pages 363 to 391, inclusive; and said papers, and each of them, were then and there filed with said clerk, and said clerk indorsed thereon at said time that the same were filed.

That thereupon, and immediately thereafter, I, and my said associate counsel, went into open Circuit Court then being held and presided over by the Honorable C. H. Hanford, District Judge of the District of Washington, sitting as Circuit Judge, for said district, and presented the order, a copy of which appears at pages 362 and 363 of the printed record herein, and the bond, a copy of which appears in the printed record herein at pages 392 to 394 thereof, inclusive; that thereupon said Judge signed said order by affixing his name thereto, and approved said bond by making and signing the indorsement thereon, at page 394 of the printed record.

I then immediately, accompanied by my said associate

counsel, returned to the clerk's office, and filed therein said order and said bond so signed and approved, by delivering to, lodging, and leaving with R. M. Hopkins above mentioned, in his said office, said order and bond signed and approved as aforesaid; and said R. M. Hopkins indorsed said papers, and each of them, as filed on said day.

That thereupon, at the request of this affiant, the clerk of said Circuit Court, acting through the aforesaid R. M. Hopkins, as his deputy, issued under the seal of the Court, and delivered to me, the original writ of error, now on file herein, a copy of which appears at pages 398 to 400, inclusive, of the printed record herein; that myself and my said associate counsel immediately returned to open court, as aforesaid, and presented said writ of error to the before-mentioned Judge, who indorsed thereon his allowance as the same appears at page 399 of the printed record herein. Myself and my said associate counsel then immediately returned to said clerk's office, and then and there filed said writ of error with said clerk, by delivering to, lodging, and leaving with the aforementioned R. M. Hopkins, deputy clerk, the aforesaid writ of error, and also at the same time filed with and delivered to said R. M. Hopkins, as said deputy clerk, a true copy of said writ of error, for the use of the defendant in error.

That then, myself and my associate counsel immediately presented to the before-mentioned Judge the citation, a copy of which appears at pages 395 and 396 of the printed record, and said Judge signed the same; and I then delivered said citation to one James M. Quilter, a

deputy United States Marshal for the District of Washington, with instructions to duly serve and return the same; and he, on the same day served the same upon the defendant in error, as appears from the return of said marshal, a copy of which appears at pages 397 and 398 of the printed record herein.

I also caused a copy of said citation to be served upon the attorneys for defendant in error, who admitted service thereon, as appears from the printed record at page 396.

That said citation was by said marshal, as this affiant is informed and believes, returned to and filed with the clerk of said Court on the 18th day of December, 1895.

R. C. STRUDWICK.

Subscribed and sworn to before me this 27th day of April, 1896.

[Seal] R. M. HOPKINS,

Clerk of the United States District Court for the District of Washington.

[Endorsed]: Affidavit of R. C. Strudwick. Filed May 4, 1896. F. D. Monckton, Clerk.

No. 274.

At a stated term, to-wit, the October term, A. D. 1895, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Monday, the fourth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

Honorable WILLIAM W. MORROW, District Judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

vs.

NELLIE PHINNEY, Executrix, etc.

Order Continuing Motion to Dismiss.

By consent of L. C. Gilman, Esquire, and Lorenzo S. B. Sawyer, Esquire, counsel for the respective parties, it is ordered that the motion to dismiss herein be, and the same is, continued to the June session, 1896.

It is further ordered that the cause be assigned to be heard on June 2nd.

At a stated term, to-wit, the October term, A. D. 1895, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the Courtroom, in the City and County of San Francisco, on Monday, the second day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable WILLIAM B. GILBERT, Circuit Judge.

Honorable ERSKINE M. ROSS, Circuit Judge.

Honorable THOMAS P. HAWLEY, District Judge.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, Executrix, etc. } No. 274.

Ordered motion to dismiss cause, and cause argued by Lorenzo S. B. Sawyer, Esquire, counsel for the defendant in error, and motion, and by John B. Allen, Esquire, counsel for the plaintiff in error, and against motion, and coninued to eleven o'clock A. M., to-morrow for further argument.

In the Circuit Court of the United States, District of Washington, Northern Division.

Law Register, United States Circuit Court, District of Washington, Northern Division, Volume 1, pages 134, 157, 164, 167, 169 and 178.

NELLIE PHINNEY, Executrix

vs.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK. } No. 418.

1894.	Pleadings Filed and Orders. Made.	——Clerk's Fees.—— Plaintiff.	Defendant.
Sept. 24,	Filed and entered complaint and appearance,	.70	
	Filed and entered praecipe for and issued summons	2.20	
	Issued certified copy of complaint, 18 fols.	4 30	
25.	Filed and entered summons returned,	50	
Oct. 18.	Filed and entered appearance and motion to strike		.70
	Filed and entered stipulation as to time to plead,		.20
Nov. 1.	Filing and entering notice		.20

	14, Filing and entering notice	.20	
	Filing and entering interrogatories,	.20	
	20, Entering order motion to strike denied, etc.	.30	
	26, Filed and entered demurrer		
Dec.	1, Filing and entered notice to call up demurrer	.20	
	Entering order demurrer overruled exceptions, etc., twenty days to answer,	.30	
	Entering order for motion for inspection of policy denied	.20	
	Filing and entering affidavit Nellie Phinney	.20	
	26, Filing and entering answer		.20
	28, Filing and entering demurrer	.20	
	Filing and entering notice	.20	
1895.			
Jan.	1, Filing and entering notice (2) and interrogatories	.60	
	7, Filing and entering notice and motion .20		
	Entering order granting leave to amend complaint	.30	
	16, Filing and entering complaint as amended	.20	
	24, Filing and entering answer to amended complaint		.20

	25,	Filing and entering notice of appearance	.50
	26,	Filing and entering demurrer	.20
		Filing and entering exceptions	.20
		Filing and entering notice and motion	.20
	28,	Filing and entering notice and demurrer	.20
Mch.	18,	Filing and entering notice .20	
	21,	Entering order to amend answer,	.30
		Entering order on demurrer under advisement	.30
	26,	Filing and entering opinion	.20
		Entering order for demurrer sustained, twenty days to amend answer,	.30
Apr.	15,	Filing and entering amended answer	.20
	23,	Filing and entering reply .20	
		Filing and entering motion .20	
		Filing and entering interrogatories, affidavit, and motion .20	
	25,	Filing and entering motion to strike	.20
May	3,	Filed and entered exceptions to interrogatories (proposed) (2)	40

	4, Filed and entered order settling interrogatories, (2) two fol. each,		1.60
	Filed and entered notice of settling interrogatories,	.20	
	21, Filed and entered motion of plaintiff for commission to take deposition	.20	
	Entering order to issue commission	.30	
	24, Issuing commission to take deposition, (2)	4.00	
	Preparing and certifying plaintiff's interrogatories, 15 fols.	3.70	
	31, Filed and entered order denying motion to strike part of reply, 1 fol.		.50
Jun.	3, Filed and entered demurrer of defendant to parts of reply,		.20
	14, Filed and entered notice of argument of demurrer,		.20
	Filed and entered depositions sealed Forbes et al,	.20	
	15, Filed and entered motion to strike from trial calander,		.20
	17, Entering order to publish deposition of June 14,	.30	
	Filed and entered deposition as published	.20	

	Entering order on demurrer of plaintiff's reply overruled—exceptions,		.30
	Entering order denying motion to strike from the calander		.30
July 1,	Filed and entered motion to produce insurance policy	.20	
	Filed and entered notice and motion to file second amended answer,		.20
	Filed and entered second amended answer		.20
	Filed and entered order to produce insurance policy, 2 fols.	.80	
	Entering order associating Stratton, Lewis & Gilman, as counsel for defendants.		.30
3,	Filed and entered stipulation to publish deposition	.10	.10
	Filed and entered deposition as published,	.20	
9,	Filed and entered affidavit of W. S. Pond,		.20
10,	Filed and entered praecipe for and issued subpœna,	.70	
12,	Filed and entered subpœna returned	.20	
July 16,	Filed and entered reply to second amended answer,	.20	

	Filed and entered notice to produce papers	.20	
	Filed and entered notice to produce papers	.20	
18,	Filed and entered praecipe for and issued subpoena,		.70
22,	Filed and entered notice and motion for continuance,		.20
	Filed and entered affidavit of R. D. Coutant et al. (support of motion)		.20
	Filed and entered order denying motion for continuance		.50
	Filed and entered affidavit of Nellie Phinney (resisting motion for continuance)	.20	
23,	Filed and entered praecipe for and issued subpoena	.70	
	Filed and entered praecipe for and issued subpoena	.20	
	Filed and entered subpoena returned		.20
	Filed and entered praecipe for and issued subpoena		.70
	Filed and entered subpoena returned		.20
25,	Filed and entered subpoena returned,	.20	
	Entering record first day's trial,	.60	

	Filing exhibits "A" to "G," "I," "J," "K," plaintiff,	2.00	
	Filing exhibits No. 1, defendant		.20
26,	Entering record second day's trial	.30	
	Filing exhibits "H," "L," "M," "N," "O," plaintiff,	1.00	
	Filing exhibits 2 to 8 inches, defendant		1.40
27,	Entering record third and final days' record	.30	
	Filed and entered instructions asked by plaintiff and defendant	.20	.20
	Filed and entered verdict, Judgment for plaintiff $9,7012.84,	.20	
29,	Filed and entered order to withdraw exhibits for use of stenographer	.25	.25
	Filed and entered order extending time to file affidavits,		.50
	Filed and entered notice of motion for new trial,		.20
	Filed and entered motion for new trial		.20
30,	Filed and entered order to extend time to prepare, serve and file bill of exceptions,		.50

Aug. 10,	Filed and entered motion to dismiss and for judgment,		.20
	Filed and entered affidavit of R. C. Strudwick and W. A. Shannon, (2)		.40
16,	Filed and entered notice to call up motion of dismissal,	.20	
19,	Filed and entered motion for new trial continued indefinitely		.50
26,	Filed and entered order extending time to prepare, serve, and file bill of exceptions,		.50
Sep. 14,	Filed and entered bill of exceptions,		.20
19,	Filed and entered order and stipulation extending time in re bill of exceptions,	.25	.25
28,	Filed and entered objections to defendants proposed bill of exceptions,	.20	
Oct. 1,	Filed and entered notice of settlement of bill of exception,		.20
3,	Filed and entered order extending time to settle bill of exceptions		.20
5,	Entering order motion to dismiss and motion for new trial submitted		.30

7,	Entering order for motion to dismiss and for new trial denied, exceptions		.50
16,	Filed and entered order extending time to settle bill of exceptions,		.50
17,	Filed and entered judgment, 2 fols.	.80	
	Filing bill of exceptions as settled,		.20
	Filed and entered order settling bill of exceptions 10 fols.		3.20
25,	Filed and entered cost bill,	.20	
31,	Filed and entered objections to cost bill		.20
Nov. 20.	Filed and entered notice of taxation of costs,	.20	
25,	Filed and entered notice and motion to retax costs,		.20
Dec. 2.	Filed and entered order on taxation of costs, 1 fol.	.50	
	Filed and entered affidavit for writ of garnishment,	.20	
3,	Issued writ of garnishment,	2.00	
	Issued two certified copies of same for marshal, fols. each	3.00	
	Filed and entered motion, application for writ of garnishment	.20	

	Filed and entered praecipe for writ of garnishment,	.20	
14,	Filed and entered order overruling writ of garnishment, 1 fol.		.50
	Filed and entered assignment of errors		.20
	Filed and entered petition for order for writ of error		.20
	Filed and entered order allowing writ of error		.80
	Filed and entered bond on writ of error, 6 fols		2.00
	Issued writ of error		5.00
	Issued citation		2.00
	Filed and entered praecipe for transcript, (2)		.20
17,	Filed and entered writ of garnishment returned,	.50	
31,	Preparing and certifying transcript for defendant in error 736 fols.	147.90	
1896.			
Jan. 2,	Preparing and certifying transcript for plaintiff in error, 1055 fols at 20 cents, ctf. 70 cents.		211.70

United States of America,
District of Washington. } ss.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the District of Washington, do hereby certify that the foregoing four (4) typewritten pages numbered from one (1) to four (4), inclusive, is a full, true, and correct transcript of Law Register United States Circuit Court, District of Washington, Northern Division, volume 1, pages 134, 157, 164, 167, 169, and 178, in the office of the clerk of said Circuit Court of Seattle, Washington, and that the same is a true record of every and all items of clerk's fees charged in the case of Nellie Phinney, executrix, vs. The Mutual Life Insurance Co. of New York, being cause No. 418 in said Circuit Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at Seattle, Washington, this 29th day of April, 1896.

[Seal.]

A. REEVES AYRES,
Clerk.

By R. M. Hopkins,
Deputy Clerk.

[Endorsed]: Transcript of Law Register. June 3, 1896. F. D. Monckton, Clerk.

At a stated term, to-wit, the October term, A. D. 1895, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Wednesday, the third day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable WILLIAM B. GILBERT, Circuit Judge.

Honorable ERSKINE M. ROSS, Circuit Judge.

Honorable THOMAS P. HAWLEY, District Judge.

THE MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
NELLIE PHINNEY, Executrix, etc.,
No. 274.

Ordered cause further argued by John B. Allen, and Robert Sewell, Esquire, counsel for the plaintiff in error, and by Stanton Warburton, Esquire, and Andrew F. Burleigh, Esquire, counsel for the defendant in error, and submitted, to the Court for consideration and decision.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, Deceased.
Defendant in Error.
} No. 274.

Error to the Circuit Court of the United States, for the District of Washington, Northern Division.

Opinion.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge, delivered the opinion of the court:

We are prevented from considering the interesting questions of law arising upon the merits of this case by the fact that the record fails to show that the writ of error sued out herein was filed in the court below.

It is, among other things, provided by the act of Con-

gress creating the Circuit Courts of Appeals and defining their jurisdiction, that "no appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed . . . . ." and that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error." (Sec. 11. Act of March 3, 1891, 26 Stats. 826-829.)

The writ of error is the writ of the appellate court, and it has long been well settled that it is not brought or sued out within the meaning of the statute providing that means of reviewing a judgment at law until it is filed in the court which rendered the judgment. "It is the filing of the writ that removes the record from the inferior to appellate court," is the declaration of the Supreme Court as early as the year 1850, and which has been repeated in numerous cases. (Brooks v. Norris, 11 How. 203-207; Mussina v. Cavazos, 6 Wall. 355; Scarborough v. Pargoud, 108 U. S. 567; Polleys v. Black River Co., 113 U. S. 81; Credit Company, Limited v. Arkansas Central Railway Co., 128 U. S. 260. See, also, Warner v. T. & P. Railroad Co., 54 Fed. Rep. 920; Stevens v. Clark, 62 Fed. Rep. 321.)

As the filing of the writ in the court below is essential to the transfer of the jurisdiction of the case from that

court to this, it is clear that, until that is done, this court is without jurisdiction to entertain the case.

Upon the writ of error found in the record is this indorsement: "Received a true copy of the foregoing writ of error for defendant in error. Dated this 11th day of December, 1895. A. Reeves Ayres, Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington. By R. M. Hopkins, Deputy Clerk." This is the only thing in the printed record to indicate that the writ of error ever reached the clerk of the court below—the statement being that the clerk received a copy of the writ "for the defendant in error." This was but the statutory mode of serving the writ on the adverse party, pursuant to the provisions of section 1007 of the Revised Statutes, which reads: "In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedaes by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation, but if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases, where a writ of error may be a supersedeas, executions shall not issue until the expiration of (the said term of sixty) ten days."

Such lodgment of a copy of the writ with the clerk for the defendant in error does not do away with or take the

place of the essential requirement of filing the writ in the court below, without which the apellate court acquires no jurisdiction of the case. The writ of error, as held by the Supreme Court in Hodge v. Williams, 22 How. 87, is not mere matter of form, but matter of substance, prescribed by law, and essential to the jurisdiction of the appellate court. That the latter court has no appellate power over the judgment of the trial court unless that judgment is brought up in the manner provided by the act of Congress, is thoroughly settled. And that the writ here in question was not filed in the court below not only appears from an inspection of the original writ, which has been sent, as it should have been, with the record of this court, but the same fact also appears (although in a negative form) from a certified copy of the law register of the court below, which has been presented and filed on this motion, and from one of the affidavits of the deputy clerk of the court below having charge of the office from which the record comes. In this affidavit, while the deputy clerk states that one of the attorneys for the plaintiff in error filed with him the original writ of error, it is manifest, on reading and considering the entire affidavit, that that was only the affiant's construction of what was done. After stating that one of the attorneys for the plaintiff in error "delivered to and lodged and filed with me" the original writ with the allowance thereof indorsed thereon by the judge, and at the same time "delivered to and lodged and filed" with him a copy of the writ for the use of the defendant in error, the affidavit proceeds: "That said original writ of error remained in my office and in my custody from said 14th day of December, 1895, until the 4th day of January, 1896, at which time I transmitted the same with my

return thereto to this honorable court; that the original citation herein, a copy of which appears on pages 395 and 396 of the printed record herein, was returned to and filed with me by a deputy marshal of the United States for the District of Washington on the 18th day of December, 1895, and the same remained in my office and in my custody and control from said date until the same was transmitted to this Honorable Court, together with the writ of error and return thereto on the 4th day of January, 1896. It has not been my custom to indorse original citations and writs of error at the time they are filed with or served upon me, for the reason that I have deemed the same as writs of the Circuit Court of Appeals, to be indorsed by the clerk of said court upon his receipt of the same with my return thereto; but, as a matter of fact, the writ of error and citation herein were actually delivered to and filed and lodged with me, as above stated."

It is quite evident, we think, from this affidavit, as well as from the copy of the law register of the court below, that the actual fact is not inconsistent with the record as presented; which fails to show that the writ of error was there filed.

It is urged on behalf of the plaintiff in error that, as the original writ was left or lodged with the clerk, it was, in legal effect, filed in the court; that the indorsement is but the evidence of the filing, and that, as the original writ was, in fact, left or lodged with the clerk, it was as much filed in the court as if it had been indorsed as filed by him.

It may be that in some instances and for some purposes the mere deposit of a paper by a party or his attorney with the clerk of the court, and his receipt thereof, of itself constitutes a "filing." The case of Tregambo v. The Comanche Mill and Mining Co., 57 Cal. 510, relied upon, among others, by the plaintiff in error, presented the question of the entry of the default of the defendant to the suit under these circumstances: The attorneys of the parties to the action resided in Bodie, twenty miles away from the county seat of Mono county, at which place was the office of the clerk of the court. On the 20th of April, 1879, the defendant's attorneys forwarded to the clerk of the court to be filed certain demurrers to the complaint, copies of which had been served on the plaintiff's attorneys, together with notice that the demurrers would be called for argument on May 2, 1879. The demurrers were regularly delivered to the clerk of the court on April 29, 1879. He received them without demanding his fees for filing them, but about six o'clock P. M. of May 1, 1879, defendants' attorneys received a letter from the clerk informing them that he demanded payment of his fees for filing the demurrers. On the morning of the 2nd of May, defendants' attorneys left Bodie for the county seat, and arrived there the same day about noon. Immediately upon their arrival they tendered to the clerk his fees, but he refused to receive them, because he was then in the act of entering the defendants' default for not answering. The court said:

"We think the District Court should have set aside a default entered under such circumstances. When the demurrers were placed in the custody of the clerk, he had a legal right to refuse to file them, unless the fees for that

service were paid to him. (Cal. Codes, Stats. in Force, sec. 765; Pol. Code, sec. 4332.) But he did not refuse, nor did he demand any fees then or afterward for filing the demurrers. Three or four days after he received them for filing, he demanded by letter $66 as fees on filing twenty-two demurrers in said case. But there was no law which allowed $3 as a fee for filing a demurrer; the demand was therefore unauthorized by law. Having failed to demand his fees for filing the demurrers at the time they were delivered to him to be filed, or at any time thereafter, he waived his personal privilege of requiring prepayment. There is no question but that a clerk of a court may waive a right created by statute. (Lick v. Madden, 25 Cal. 203.) When, therefore, the demurrers were brought and deposited with the clerk for filing, they were, in contemplation of law as to the defendant, on file in the case. A paper in a case is said to be filed when it is delivered to the clerk and received by him, to be kept with the papers in the cause. (Engleman v. State, 2 Ind. 91.) Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office. Indorsing it with the time of filing is not a necessary part of filing. (Bishop v. Cook, 13 Barb. 326.) When filed, it is considered an exhibition of it to the court, and the clerk's office in which it is filed represents the court for that purpose. (Lamson v. Falls, 6 Ind. 309."

Burrill's Law Dictionary defines "filing" as follows: "Delivering the paper (indorsed with the title of the cause and attorney's name) to the clerk of the court in which the action is pending, who marks it 'filed,' adding

the date, and deposits it under the proper head among the papers or files in his office."

Other lexicographers define it thus: "To file a paper on the part of a party is to place it in the official custody of the clerk. To *file* on the part of the clerk is to indorse upon the paper the date of its reception and retain it in his office, subject to inspection by whomsoever it may concern." (Webster's International; Burrill.)

In the English chancery practice a bill is not deemed filed until it receives the proper indorsement of the clerk. (Daniel's Chan. Prac. and Plead., 6th Am. Ed., star page 399.)

In Pinders v. Yager, 29 Ia. 468, it was held that the filing of a transcript imports more than the mere reception of it into the custody of the clerk; that his indorsement of it is necessary. In Foster's Fed. Prac., 2nd ed., 598, it is said: "No paper is considered filed unless it has the proper indorsement by the clerk." This, however, is said in treating of the subject of "costs at law and in equity." And so was the Court speaking of fees proper to be allowed, in the case of Amy v. Shelby Co., 1 Fed. Cas. 817, when it said: "No paper is filed unless it has the proper indorsement of the clerk; merely placing it in the court papers is no filing."

It may be, as already observed, that the indorsement of the clerk may not, in all cases, be essential to constitute a "filing." The writ of error, however, is the writ of the appellate court, and must be sent up with the record to this court. It does not remain in the lower court and

itself become a part of the files of that court. Unless it is actually filed and thus becomes a part of the record of the lower court, there would remain in that court no record whatever of such a writ, and nothing to show any transfer of jurisdiction from the trial to the appellate court; and when it reaches the latter court, it would contain no evidence whatever of the fact essential to confer jurisdiction upon the appellate court.

We are of opinion that, by reason of the failure to file the writ of error in the court below, this court is without jurisdiction of the case.

Writ dismissed.

[Endorsed]: Filed Oct. 26, 1896. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, Deceased,
No. 274.

Dissenting Opinion.

Before GILBERT and ROSS, Circuit Judge, and HAWLEY, District Judge.

GILBERT, Circuit Judge, Dissenting:

The decisions of the Supreme Court, referred to in the

opinion of the majority of the court, establish beyond question that it is the filing of the writ that removes the record from the inferior to the appellate court, but I am unable to concur in the view that it is essential to the filing of the writ that the indorsement of that fact be entered thereupon by the clerk.

At common law the file was a thread, or string, or wire upon which writs and other papers in courts were fastened and filed for safekeeping and for ready reference. To file a paper meant to place it upon the string or file where it belonged. The courts of the United States in interpreting the word "file" or "filing," have uniformly had in view the derivation of the word and its common law signification, and they have held that a paper is filed when it is delivered to the proper officer, and is by him received to be kept on file; and that it is not the clerical act of indorsing the paper, but the fact of its receipt by the proper officer or custodian and its lodgment in his office that constitutes a filing. They have held, moreover, that while the indorsement is the best evidence of the fact that a paper has been filed, proof of the filing may be otherwise made. This doctrine has been applied alike to the filing of pleadings and transcripts in courts and the filing of deeds and mortgages for record. (Bishop v. Cook, 13 Barb. 326; Bettison v. Budd, 21 Ark. 578; Gorham v. Summers, 25 Minn. 81; Peterson v. Taylor, 15 Ga. 483; Colchen v. Ninde, 120 Ind. 88; Hook v. Fenner, 18 Col. 283; Harrison v. Clifton, 75 Ia. 736; Lessing v. Gilbert, 27 S. W. 751; Cook v. Hall, 1 Gilman, 575; Powers v. State, 87 Ind. 144; Reed v. Acton, 120 Mass. 130.) The only cases holding otherwise are, first, those

in which the statute or rule of court requires that the indorsement be entered upon the paper by the clerk as a part of the filing; and second, cases in which question has arisen concerning the payment of the clerk's fees for filing, and his right to recover the same has been made to depend upon whether or not he had discharged all of his official duty by making the proper indorsement upon the papers filed by him. Of the first class is the case of Pinders v. Yager, 29 Ia. 468. Under the rule of the Circuit Courts of Iowa the clerk could refuse to file a transcript on appeal from a justice's court unless his fee was paid or secured. It was held that on his refusal to file for nonpayment of his fees the transcript did not become a record of the court. In a recent decision of the Supreme Court of that State, Harrison v. Clifton, supra, a case which arose after the abrogation of the rule above referred to, it was held, under section 3584 of the Code, providing that "upon the return of the justice being filed in the office of the clerk the cause shall be deemed in the Circuit Court," that the deposit of the transcript was a sufficient filing. Of the second class is the case of Amy v. Cherokee County, 1 Federal Cases, 817, which was a contention concerning the proper fees to be allowed to the clerk, the decision of which I submit is not pertinent to any question presented in this case. Nor do I deem it an important consideration, in determining what is the effect of simply lodging a writ of error with the clerk of the court below, that unless the writ of error has been indorsed as filed, and an entry thereof made in the docket or the fee-book of the clerk of the lower court, no evidence exists in that court after the writ has been returned to indicate the fact that the writ has been sued

out. The writ is lodged with the clerk for the purpose of removing the case from the jurisdiction of the lower court. He makes his return to the writ and sends the original thereof to this Court, together with his transcript. If, after indorsing upon such writ the fact that it was filed, the clerk should neglect to make an entry to that effect in his docket or fee-book, the jurisdiction of this court would certainly not be affected by such omission, notwithstanding the fact that nothing remained on record in the lower court to indicate that its jurisdiction over the cause had ceased. The appeal could not be dismissed by this court upon the ground that the lower court had before it no record to indicate the fact of the filing of the writ. That fact could, undoubtedly, be proven aliunde, if necessary. The return of the writ to this court in the case before us is evidence to us that it has been filed in the court below. Further evidence is afforded in the affidavit of the clerk which has been filed in this court, showing that the original writ was delivered to and lodged and filed with the clerk on the date which it bears. This, in my opinion, constitutes sufficient proof of the fact of the filing of the writ in the court below, and gives this court jurisdiction to entertain the same.

[Endorsed]: Dissenting Opinion. Filed Oct. 26, 1896. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased,
No. 274.

Judgment.

In Error to the Circuit Court of the United States for the District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Washington, Northern Division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the writ of error of the said plaintiff in error in this cause be, and the same is hereby, dismissed.

[Endorsed]: Judgment. Filed Oct. 26, 1896. F. D. Monckton, Clerk.

At a stated term, to-wit, the October term, A. D. 1896, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Friday, the thirtieth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable ERSKINE M. ROSS, Circuit Judge.

Honorable THOMAS P. HAWLEY, District Judge.
Honorable WILLIAM W. MORROW, District Judge.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
vs.
NELLIE PHINNEY, Executrix, etc. } No. 274.

Certified Copy of Order.

Upon motion of Sydney M. Van Wyck, Jr., Esquire, on behalf of plaintiff in error, good cause therefor appearing, it is ordered that the issuance of the mandate herein to the court below be, and the same is hereby, stayed twenty-five days in addition to the time allowed by the rules of this court, plaintiff in error to have leave to file petition for rehearing within that time.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased.
Defendant in Error.
} No. 274.

In Error to the Circuit Court of the United States for the District of Washington, Northern Division.

Petition for Rehearing.

To the Honorable Judges of said Court:

In conformity to the rule of this court permitting an application for a rehearing of a cause determined by the court, we wish most earnestly to press upon the attention of the court a few reasons why a rehearing should be granted in this case. We approach this application with the conviction that the court is reluctant to debar a litigant from a hearing of his cause upon its merits, if, consistently with a fair construction of the statutes relating to appeals, it can grant a rehearing. The doors of the court are closed against us, because it has been held by a majority of the judges that the writ of error was not filed in the Circuit Court, and therefore the cause was never removed from that court to this. In

reaching this conclusion, we cannot held thinking certain matters in the record were overlooked. That a writ of error in the case, properly signed, sealed and allowed, issuing out of this court, was lodged with the clerk of the Circuit Court is conceded in both the majority and minority opinions. The transcript of this original writ as returned is found at page 402 of the printed record. That the clerk of the Circuit Court received the writ officially, and obeyed its mandate in conformity with the rules of this court providing for his return of the record, is made clearly manifest by his return to this writ found at page 400 of the record. The writ having been directed to and lodged with the clerk of the Circuit Court, and in it he being commanded to send the record and proceedings of the case into this court, together with the writ, he obeyed such mandate and has returned the original writ, together with the record and proceedings in the case, as he was commanded to do, and the same are now a part of the records of this court.

Rule 14, of the Circuit Court of Appeals, sec. 1, provides:

"The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case under his hand and the seal of the court."

While sec. 2 thereof is as follows:

"In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was ren-

dered shall annex to and transmit with the record the original writ of error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid."

All of the requirements of these sections of the rule have been strictly complied with. It will be observed that both sections are entirely silent upon the subject of writing an endorsement of filing upon the writ of error. In fact, they impliedly would lead the clerk of the Circuit Court to conclude such was not his duty. The writ of error does not remain with him. His office is not its depository. He is not required to keep it but to append the transcript of the record and the proceedings in the cause to it and return it, not by transcript, but in its original form, to the appellate court from whence it came. It is made manifest by the return itself, compared with these rules, that the clerk acted in good faith and sought to do everything the law and the rules required of him, and did everything of a substantial nature. That the writ was received by him for the purposes of its functions is demonstrated in his certificate and its presence in this court. It was only transmitted to him in order that he might make a return. That he received it, that he made the return which is annexed to the writ itself, and that it was lodged with him at the instance of the plaintiff in error, whom he certifies paid him $211.70 for the cost of preparing and certifying the transcript which he annexed to the writ, is attested under his hand and official seal. In this we have a higher certificate of the lodgment and filing of the writ with him for the purposes it was designed to subserve than could be found by his

mere endorsement upon the back of the paper, because we have such certificate authenticated with the seal and his official obedience to all of its commands. Nothing is lacking in substance. It is the mere formula or evidence of what has already been demonstrated. Rule 14 itself would seem to dispense with the endorsement of filing. It is specific as to just what the clerk shall do. It is no place in the rule stated that he shall put his endorsement upon it, but it is stated that when the writ is directed to him he shall "make a return of the same" by transmitting a true copy of the record, etc., under his hand and the seal of the court, and annexing to and returning with the record the original writ and citation, and a certificate stating the cost of the record and by whom paid. There seems almost implied in this rule a prohibition against placing his file mark upon it, because that usually pertains to papers which are permanently lodged in his office, whereas in this case the mandate is not to retain it but to return it to the tribunal from whence it came.

We respectfullly contend that the word "filing" in the opinions of the Federal courts is not used in its narrow, literal or mechanical sense, but in a broader sense, which is made plain by the statutes and the rules, viz., a reception of the writ for the purpose of making a return to it and transmitting it to this court. It is in the broader meaning, in the sense of handing the writ to the clerk to enable him to comply with its mandate, just as as process is given to the sheriff for execution and return, that the word "filed" is employed. The idea of filing in the narrow and literal sense is foreign to the function the clerk performs. Then why, having done everything the law contemplates in obedience to the mandate of the

process, in furnishing the record and transcript by the custodian having charge of the same, should the jurisdiction of this court perish or fail to come into being, because the mere label on the back of the paper was omitted, when a higher and more subsantial proof of all that such evidence could furnish is given to the court?

But, again, we call the court's attention to the original citation at page 404 of the record, signed by Judge Hanford, sitting as United States Judge, which cites and admonishes the defendant in error to appear in this court "pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the District of Washington, Northern Division, in that certain action wherein the Mutual Life Insurance Company of New York is plaintiff in error, and you are defendant in error." Such a certificate of the presiding judge that the writ of error was filed in the office of the clerk should be conclusive. The clerk is but the hand of the court, and the certificate of the judge that the writ was filed should overcome an error on the part of the clerk and much more supply his omission. This certificate of the judge is furnished on the 14th day of December, 1895, the day upon which the writ of error, signed by the same judge, bears date, and the citation in which the judge certifies to the filing of the original writ is upon the same day served upon counsel of the defendant in error, who make acknowledgment of the same: "Service of the within citation and receipt of a copy thereof admitted this 14th day of December, 1895, S. Warburton, A. F. Burleigh, attorneys and counsel for Nellie Phinney, as Executrix of the last will and testament of Guy C. Phinney, deceased."

The rule of law is clearly stated in the majority and minority opinions in this case that a writ of error is not brought until filed with the court to which it is addressed and whose record is to be removed thereby. This rule was first authoritatively and forcibly stated in the case of Brooks v. Norris, 11 Howard (U. S.), *p. 207, where the court says:

The act of 1789, c. 20, sec. 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question."

The section of the Judiciary Act referred to (1 Stats. at Large, p. 84), as well as the same statute incorporated in the Revised Statutes of the United States, in secs. 997, 998, 999, 1000, 1007 and 1008 are no less conspicuous than Rule 14 of this court in omitting the word "file" or the term "filing" from every provision of the statute that relates to writs of error. The language of the original Judiciary Act, sec. 22, is that "decrees and judgments" may be re-examined and reversed or affirmed "upon a writ of error, whereto shall be annexed and returned therewith at the time and place therein mentioned, an authenticated transcript of the record, an assignment of errors,

and prayer for reversal, with a citation to the adverse party, signed by the judge," etc. And later along in the same section, "And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of."

Sec. 1008 of the Revised Statutes contains the same limitation as follows:

"No judgment, decree, or order of a circuit or district court in any civil action, at law or in equity, shalll be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment. decree, or order."

The court must look outside of both the language of the statutes and the rule to find the word "file" or the term "filing" or any similar expression. We respectfully submit that a technical filing in the narrow sense of that term at no time entered into the contemplation of the writers of the opinions of the Supreme Court where they held that a writ of error was not sued out until filed in the office of the clerk of the trial court. What they were seeking to do was to determine a time from which the control of the trial court ceased, and from which the period of limitation on appeal or writ of error began to run. They properly held that neither the act of issuing the writ from the higher court, nor the attestation upon the writ, fixed this time, but that placing the writ in the hand of the proper officer for obeying its command determined, viz., the filing or lodging of the writ of error with the officer whose duty it was to obey its mandate.

That such is the meaning of the statute, and such must have been the meaning of the court, is made manifest by sec. 1007 of the Revised Statutes relating to supersedeas. That section provides that, "In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterwards with the permission of a justice or judge of the appellate court."

What is expressed by the word "lodge" in this section, we contend is exactly what is meant in the opinions of the Federal courts. The writ of error is simply lodged with the clerk for the purpose of making a return by him upon it. It is in his custody transiently and temporarily. It is with him for the purpose of being surrendered up or returned to the appellate court, just as the copy of the writ is lodged with him to be given to the defendant in error. Such lodging of the writ with the clerk of the Court is doing all it is possible for the party appealing to do to make his right complete. If this were not true, a delay on the part of the clerk might rob the appellate court of its jurisdiction, or an honest misconception—as in this case—have the same effect; or a deception or falsehood upon the part of the clerk might be attended with like consequences.

This meaning of the term "file" is illustrated in Ex parte Ralston, 119 U. S. 613, where it is held that the clerk below is not required to furnish a transcript until a writ of error is issued to which it may be attached, Chief Justice Waite saying:

"Certainly it has been the prevailing custom from the beginning for the clerk of this court, or the clerk of the Circuit Court for the proper district, to issue the writ, and for such a writ to be lodged with the clerk of the state court before he could be called on to make the necessary transcript for use in this court." (P. 615.)

Were no further proof furnished of the filing of the writ than the supersedeas bond (See Record, pages 392, 393, 394), approved by the presiding judge, that should be sufficient. It will be observed that sec. 1007 of the Revised Statutes provides that where a writ of error may be a supersedeas, such supersedeas may be obtained by serving the writ of error, by "lodging" a copy thereof for the adverse party in the clerk's office, where the record remains, within sixty days, etc. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law as aforesaid within sixty days after the rendition of such judgment, or afterwards with the permission of a justice or judge of the appellate court.

It will be seen by page 394 of the printed record that such supersedeas bond was given on the day the writ of error was issued; upon the same day a copy of it was lodged in the clerk's office pursuant to sec. 1007; and that the same judge who upon that day signed the cita-

tion, reciting that a writ of error had been filed in the clerk's office, approved the supersedeas bond, which could only in the orderly and proper course be done after the filing of the writ of error and the lodging of a copy with the clerk for the defendant in error. The above acts, as conclusive of the filing of the writ of error, as we think we have demonstrated them to be, are supplemented by the affidavit of the clerk and by the affidavit of counsel on file in this court, to which attention is also specifically called as showing each step in the proceeding down to the delivery of the writ of error into the hands of the clerk of the Circuit Court in his office, with the express request for its filing and obedience to its mandate upon his part, and a payment to him of the fees for the transcript and record.

If such fatal shipwreck were intended to be the consequence of a failure to indorse the evidence of filing upon the writ, we respectfully submit that some beacon light surely would have been placed in the Judiciary Act or in the language of Rule 14 of this court. To prevent such miscarriages of justice we think Sec. 32 of the Judiciary Act of 1789 (sec. 954 of the Revised Statutes of the United States), was enacted, which is as follows:

"No summons, writ, declaration, return, process, judgment, or other proceeding in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring spe-

cially sets down, together with his demurrer, as the cause thereof."

Justice Story, in 1st Gallison, at page 22, in applying this statute, says:

"By the judiciary act of 1789, c. 20, sec. 32, it is enacted, that all the courts of the United States, may, at any time, permit either of the parties 'to amend any defect in the process or pleadings, upon such conditions, as the said courts respectively shall, in their discretion, and by their rules, prescribe.' The language of this section is sufficiently comprehensive to sustain the application for amendments in any cases before the court; but it has been attempted to be restricted to causes of original, and not to be extended to causes of appellate jurisdiction. But we find no such distinction in the statute; and even in appellate courts, proceeding according to the course of the common law, defects apparent upon the record may be amended, when they come within the general purview of statutes." (1st Gallison Rep. pp. 22, 23.)

In Warren v. Moody, 9 Fed. 673, Pardee, C. J., in construing this statute says:

It (the case) came up for hearing at last term, when an amendment of substance was allowed to the original bill, and the cause continued to allow the defendant to meet the amended bill by motion to strike out or answer or plead, as counsel might advise. The defendant moves to strike out the amendment, and this motion presents the question whether it is allowable on appeal in equity to permit amendments to pleadings."

In Kennedy v. Georgia State Bank, 8 How. 610, it is said:

"There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. And the thirty-second section of the judiciary act of 1789, (now Rev. Stats., sec. 954,) allowing amendments, is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction."

"And then the court cites Anon., 1 Gall. 22, in which case Justice Story, in a forcible arguments, holds that amendments may be allowed in appellate courts."

It is apparent from these decisions that this statute applies to writs from this court as much as to those of the courts of original jurisdiction, and it will be seen that Congress has declared that no writ, process, or return shall be abated, arrested, or quashed for any defect or want of form, and that the sourt shall regard the substance of the matter. Therefore, in this case, the judge of the court below in his citation having afforded a certificate that the writ was fied in that court, the clerk of the court having demonstrated the correctness of the judge's certificate that the writ was filed by returning it in all respects as required by the mandate of this court, and having furnished the additional proof that it was filed by production the copy of the original writ lodged with him for the defendant in error, and both clerk and judge having added to this conclusive weight of evidence the further fact that the supersedeas bond was timely filed and judicially approved, if anything could still be wanting it is certainly not a matter of substance

but just such a defect or omission as the Statute of Jeofails just quoted was intended to cover.

We desire briefly to call the court's attention to some of the opinions of the Supreme Court of the United States cited in the majority opinion(in order to show that in the view of the judges it was the service upon the clerk of the trial court or a lodgment with or delivery to him of the writ of error that constituted the filing. An examination of the leading case of Brooks v. Norris, 11 How. 207, will show that no other sense of the term "filing" was in the court's mind. The language of Chief Justice Taney is that the writ of error is not brought until it is filed in the court which rendered the judgment, not by the court.

This meaning is very fully borne out by a reference to the case of Mussina v. Cavazos, 6 Wallace, 355, wherein Justice Miller defines what is necessary to confer jurisdiction upon the appellate court so far as the service of the writ of error is concerned. At page 358, he says:

"When deposited (the writ of error) with the clerk of the court, to whose judge it is directed, it is served; and the transcript which the court sends here is the return to the writ, and should be accompanied by it."

Here, it will be observed, that the deposit with the clerk of the lower court perfects the service and gives jurisdiction to the appellate court.

In the case of Brandies v. Cochrane, 105 U. S. Rep. 262, the same idea is borne out by showing how an appeal may be perfected. No formal order granting the allow-

ance of an appeal as made, but the circuit judge approved the bond for an appeal and signed the citation. The opinion says:

"The bond was on the same day filed with the clerk and the citation served on the 18th of August. . . . . The circuit judge, by taking the security and signing the citation, allowed an appeal. No formal order of allowance was necessary."

It will be observed the court in speaking of the filing of the bond does not state it was filed by the clerk but it was filed with him. In other words it was lodged with him for his official action.

So in the case of Scarborough v. Pargoud, 108 U. S. Rep. 567, the question was whether the writ of error was brought within two years, and in fixing the date for the computation of the limitation, the court says:

"The final decree in this case was rendered on the 13th day of July, 1878, and while the writ of error was allowed by the Chief Justice of the Supreme Court of Louisiana, and a bond approved and citation signed on the 5th day of July, 1880, the writ of error was not actually issued until the 14th, and the copy was not lodged in the clerk's office until the 16th of that month."

In this quotation the court expresses exactly what is meant by the filing with the clerk, not the act of the clerk in placing his file endorsement upon the writ, but that the copy was not lodged in the clerk's office until the 16th of that month.

Again, in the case of Polleys v. Black River Improvement Company, 113 U. S. Rep. 83, the court says:

"Though the writ of error in this case seems to have been issued by the clerk of the Circuit Court of the United States on the 10th day of May, 1884, and is marked by him for some reason as filed on that day, it is marked by the clerk of the court to which it is directed, viz., the Circuit Court of La Crosse County, as filed on the 29th day of that month. It is not disputed that this is the day it was filed in his office."

It will be observed it does not state this was the day it was filed by him but in the sense of the other decisions it was the day on which it was filed in his office, or, to use the language of the other decisions, "lodged" in his office.

Again, in the case of Credit Company v. Arkansas Central Railway Company, 128 U. S. Rep, 261, the court, after setting forth that the same rule is applicable to appeals as to writs of error, proceeds to state when an appeal is taken, as follows:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought,' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers, viz., the petition and allowance of appeal, (where there is such a petition and allowance) the appeal bond and the citation. In Brandies v. Cochrane, it was held that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was

a compliance with the law requiring the appeal to be filed in the clerk's office."

Much more in this case, the citation issued by the judge of the lower court reciting the filing of the writ, the copy of the writ delivered to the defendant in error in order to procure a supersedeas bond and the allowance and approval of the supersedeas bond by the court, followed up by the due return of the original writ into this court, show the service and filing of the writ.

In addition to the cases cited in the brief and in the minority opinion, to the effect that the deposit with the clerk for filing of the writ, accompanied by payment of his fees, as in this case, constitutes a filing, we would respectfully call the court's attention to the late case of Wheeling Pottery Company v. Levi, 19 Southern Reporter, 752, issued since the argument, in which it said:

"The filing (of the petition) was overlooked by the clerk. It was handed to him in his office to be filed. It was received by him, acted upon, and was to be kept on file, and it was a document of his office. Having been placed by the attorney in the hands of the filing officer in his office, to be filed, and it having been acted upon, as already stated, and the contemporaneous facts rendering it evident that all was done in the utmost good faith, and that the omission was owing to a mere inadvertence of the officer, we think that the plaintiffs complied with the law to every intent and purpose. The absence of the 'file mark,' under the circumstances, cannot operate to his prejudice. 'Filed' is the best evidence that the document is of record, but it is not always and under all circumstances the only evidence that will prove that a peti-

tion is of record, when, owing to clerical error, it is not expressly indorsed."

We also make the following quotations from opinions of courts upon the same subject:

"All the party can do in order to have his deed filed, is to take it to the office, and deliver it to the recorder. When he has done this, he cannot be charged with any default or negligence. The deed is then, in contemplation of law, filed for record." (1 Gilman (Ill.), 575, 579.)

"But where the law requires or authorizes a party to file it (a paper) it simply means that he shall place it in the official custody of the clerk. That is all that is required of him, and if the officer omits the duty of indorsing upon it the date of filing, that should not prejudice the rights of the party." (Holman v. Chevaillier, 14 Texas, 339.)

"Filing a paper, ... means placing and leaving it among the files. The memorandum endorsed by the officer in whose custody it is placed, is merely evidence of the filing, and not filing itself." (1 Bradwell (Ill.), 145.)

"We are of opinion, that the word 'filing,' . . . . does not include the endorsing and indexing . . . . but that a mortgage is filed within the meaning of the statute, when it is delivered to and received and kept by the proper officer, in his office." (Gorham v. Summers, 25 Minn. 81, 86.)

"Careful practice would require that the clerk receiving the papers should indorse upon them the date of the filing; but such indorsement is not the filing, it is simply evidence of such filing. A paper is filed when it is delivered to the proper officer, and by him received to be kept on file." (Powers v. States, 87 Ind. 144-148.)

"We think that a certificate of the clerk, entered upon the brief at the time it is filed, is the best evidence of such filing, but that it is not necessary to the act of filing. 'A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file.' (13 Vin. Abr. 211; 1 Bouv. Law Dict. 568.) The written memorandum of the clerk is but the evidence of the delivery to him of the paper intended to be filed. In its absence, other testimony may properly be admitted to show that such paper was filed." (Peterson v. Taylor, 15 Georgia Rep. 483; 60 Am. Dec. 706.)

We have taken some pains to present the record of the case and Rule 14 of this court, as well as the statutes, for the reason that the same have not heretofore been specifically brought to this court's attention as affecting the question of dismissal for want of jurisdiction. We confidently rely upon the propositions, viz.:

First.

That under the rules, the statutes and the opinions of the Supreme Court, a filing of the writ of error by the endorsement of the clerk upon it is not contemplated; that the writ is the process of this court, issuing from it, returnable to it; that what is contemplated by a filing of the writ with the clerk of the Circuit Court is simply a depositing or lodging or delivering of the writ into his hands for the purpose of making a return.

Second.

That if the law contemplates that the clerk of the Cir-

cuit Court should file the writ by making an endorsement of filing upon it, then it is clearly apparent he has misapprehended his duty to that extent, because it is shown by the conclusive evidence of the record, as well as the affidavits of counsel and that of the clerk himself, that he received the writ for all the purposes the law designed it to accomplish through his hands; and that when it was delivered to him for his official action he endeavored to discharge his duty in every particular in accordance with its mandate. He believed the writ to be the process of the appellate court, and not of the court of which he was the clerk, and that his duty required him to return the writ to this court for filing instead of placing his file mark upon it.

Under the authorities cited, we respectfully submit the filing was complete and established by conclusive evidence though not the most usual. Therefore, we respectfully ask, if the formal indorsement of filing should be deemed necessary, that the record may be transmitted by this court, to the circuit court, with directions or leave to the clerk of that court to indorse his filing upon the writ of error as of the day it was deposited or lodged with him, and return the same so endorsed to the clerk of this court.

Respectfully submitted,

JOHN B. ALLEN,

Attorney for Plaintiff in Error.

ROBERT SEWELL,
E. LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN, and
STRUVE, ALLEN, HUGHES & McMICKEN,

Of Counsel for Plaintiff in Error.

United States of America,
State of Washington. } ss.

I, John B. Allen, one of the solicitors in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is in my judgment well-founded, and that it is not interposed for delay.

JOHN B. ALLEN.

[Endorsed]: Petition for Rehearing. Filed Nov. 16, 1896. F. D. Monckton, Clerk.

At a stated term, to-wit, the October term, A. D. 1896, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Tuesday, the twenty-third day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

Honorable WILLIAM B. GILBERT, Circuit Judge.

Honorable THOMAS P. HAWLEY, District Judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
NELLIE PHINNEY, Executrix, etc.
No. 274.

Certified Copy of Order

It is ordered that the petition for rehearing heretofore filed herein be, and the same is hereby, denied.

It is further ordered that the mandate herein to the court below be, and the same is hereby, stayed sixty days from date.

473 United States Circuit Court of Appeals for the Ninth Circuit.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
v.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, Deceased, Defendant in Error. } No. 274.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing four hundred and seventy-two pages, numbered from one to four hundred and seventy-two, both inclusive—consisting of the transcript of record, motion to dismiss cause, motion to amend certificate and return of clerk of the circuit court, affidavits (2) of R. M. Hopkins, affidavit of James M. Quilter, affidavit of R. C. Strudwick, order of court assigning motion to dismiss to June 2, 1896; order of court continuing argument on motion to dismiss to June 3, 1896; transcript of register of circuit court, order of submission of cause, opinion and dissenting opinion, judgment, order of court staying mandate, petition for a rehearing of cause, and order of court denying the petition for a rehearing of cause and staying mandate sixty days from date—to be a full, true, and correct copy of the entire record in the above-entitled cause as the originals thereof remain of record in my office.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 15th day of March, 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

FRANK D. MONCKTON, *Clerk*,
By MEREDITH SAWYER, *Deputy Clerk*.

474 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error and Nellie Phinney, executrix of Guy C. Phinney, deceased, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
475 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

476 [Endorsed:] Supreme Court of the United States. No. 766. October term, 1896. The Mutual Life Insurance Co. of N. Y. *vs.* Nellie Phinney, executrix, &c. Writ of certiorari. Filed May 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

477 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY, Petitioner and Plaintiff in Error,
vs.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, Deceased. } No. 274.

Stipulation as to Return to the Writ of Certiorari.

It is, this 20th day of April, A. D. 1897, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause submitted to the Supreme Court of the United States on the 12th day of April, 1897, with the petition for a writ of certiorari may be filed in the said Supreme Court, and may be received and considered by that court as and for the transcript of the record in said cause, as though the same had been returned by the clerk of the circuit court of appeals for the ninth circuit in obedience to the writ of certiorari granted April 19, 1897.

EDWARD LYMAN SHORT,
Attorneys for Petitioner and Plaintiff in Error.
S. WARBURTON,
Attorneys for Respondent and Defendant in Error.

(Endorsed:) Stipulation as to return to writ of certiorari issued by the Supreme Court of the United States. Filed May 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

478 I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true, and correct copy of a stipulation entered into between the respective counsel filed in the cause entitled The Mutual Life Insurance Company of New York, plaintiff in error, *v.* Nellie Phinney, executrix of Guy C. Phinney, deceased, defendant in error, No. 274, as the original thereof remains of record in my office.

Attest my hand and seal of said circuit court of appeals this 4th day of May, A. D. 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

479 United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, *v.* NELLIE PHINNEY, Executrix of Guy C. Phinney, Deceased, Defendant in Error. } No. 274.

Return to Writ of Certiorari.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the cause wherein The Mutual Life Insurance Company of New York is plaintiff in error and Nellie Phinney, executrix of Guy C. Phinney, deceased, is defendant in error, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 20th day of April, A. D. 1897, the original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States circuit court of appeals for the ninth circuit, at the city of San Francisco, in the State of California, this 4th day of May, A. D. 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit.

480 [Endorsed:] Case No. 16,545. Supreme Court U. S., October term, 1897. Term No., 342. The Mutual Life Insurance Company of New York, petitioner, *vs.* Nellie Phinney, executrix, &c. Writ of certiorari and return. Office Supreme Court U. S. Filed May 17, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,545. U. S. C. C. of appeals, 9th circuit. Term No., 342. The Mutual Life Insurance Company of New York, petitioner, *vs.* Nellie Phinney, executrix of Guy C. Phinney, deceased. Filed March 31, 1897.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 452.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

BESSIE F. SEARS, AS EXECUTRIX OF STEPHEN P. SEARS, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1899.
CERTIORARI AND RETURN FILED MAR 10 1900

(17,566.)

(17,566.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 452.

E MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

SSIE F. SEARS, AS EXECUTRIX OF STEPHEN P. SEARS, DECEASED.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the Circuit Court of the United States for the District of Washington, Western Division, July Term, 1898.

Be it remembered that on the twenty-eighth day of September, 1898, there was duly filed in said circuit court of the United States for the district of Washington, western division, a complaint in words and figures as follows, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Complaint.

Comes now the above-named plaintiff, and for her cause of action against the defendant above named complains and alleges:

I.

2 That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York for the purpose of carrying on a life-insurance business. Its principal place of business is in the city of New York in said State of New York.

II.

That the plaintiff is, and during all the times herein mentioned was, a resident and citizen of the State of Washington.

III.

That on or about the eighteenth day of May, 1891, the said defendant, in consideration of the payment to it by one Stephen P. Sears of the sum of four hundred ninety-one dollars, made, executed, and delivered in said city and State of New York a certain contract of life insurance wherein and whereby it insured the life of said Stephen P. Sears in the sum of ten thousand dollars. The defendant in said contract to pay to said Stephen P. Sears, his executors, administrators or assigns, upon acceptance of satisfactory proofs at its home office of the death of said Stephen P. Sears, said sum of ten thousand dollars. That the application of said policy contained the agreement and condition that the same was made subject to the charter of the company and the laws of the State of New York. That said application is not in the possession of plaintiff, but in that of the defendant. A copy of said policy is attached to this complaint marked "Exhibit A" and made a part hereof.

IV.

That on the thirtieth day of March, 1898, said Stephen P. Sears died in the city of Tacoma, State of Washington.

3 V.

That said Stephen P. Sears in his lifetime made and published his last will and testament, wherein he appointed Bessie F. Sears executrix thereof, to act without bond. That on or about the thirtieth day of April, 1898, said will was proved and admitted to probate in the superior court of the State of Washington in and for the county of Pierce, and on the — day of ——, 1898, plaintiff was appointed by the said court executrix thereof and duly qualified and entered upon the discharge of her duties as such executrix. And plaintiff has ever since said appointment been, and now, is the duly appointed, acting and qualified executrix of the last will and testament of said Stephen P. Sears, deceased, and that said letters testamentary have not been revoked.

VI.

That during the lifetime of said Stephen P. Sears he duly performed all the conditions of said contract by him to be performed.

VII.

That on or about the fourteenth day of June, 1898, plaintiff duly notified the defendant company of the death of said Stephen P. Sears, and inclosed in the envelope together with said notice, due and sufficient proofs of the death of said Stephen P. Sears. That on the twenty-third day of June, 1898, plaintiff received a reply to said letter acknowledging receipt by said defendant of the said notice and proofs of death. That almost three months have elapsed since the defendant received said notice and proofs of death,
4 and said defendant has made no objection to said proofs of death, and notice of death of any character or description.

VIII.

That said plaintiff has duly complied with all the conditions of said contract by her necessary to be complied with.

IX.

That said plaintiff is the owner and holder of said contract, and there is now due her from the said defendant the full sum of ten thousand dollars, with interest thereon from the twenty-third day of June, 1898.

X.

That said defendant has wholly neglected to pay said policy or any part thereof.

Wherefore plaintiff prays for judgment against said defendant in the full sum of ten thousand dollars, with interest thereon from the

twenty-third day of June, 1898, at six per cent. per annum, together with her costs and disbursements in this action.

S. WARBURTON,
Attorney for Plaintiff, 310 *Fidelity Building*,
Tacoma, Washington.

STATE OF WASHINGTON, } ss:
County of Pierce, }

Bessie F. Sears, being first duly sworn, on her oath deposes and says that she is the plaintiff above named; that she has read the above and foregoing complaint, knows the contents thereof, and believes the same to be true.

BESSIE F. SEARS.

5 Subscribed and sworn to before me this nineteenth day of September, 1898.

J. H. McDANIELS,
Notary Public in and for Washington,
Residing at Tacoma.

EXHIBIT "A."

The Mutual Life Insurance Company of New York.

No. 453,516. Amount, $10,000

Man's life, limited payment. Twenty-year distribution policy.

Age, 31 years.
Annual premium for 10 years, $491.

In consideration of the application of this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Stephen P. Sears, of Tacoma, in the county of Pierce, State of Washington, his executors, administrators, or assigns, ten thousand dollars, upon acceptance of satisfactory proof at its home office, of the death of said Stephen P. Sears during the continuance of this policy, upon the condition, and subject to the provisions, requirements, and benefits stated on the back of this policy which are hereby referred to and made part hereof:

The annual premium of four hundred and ninety-one dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the eighteenth day of May in every year during the continuance of this contract, until premiums for ten years shall have been duly paid to said company.

6 In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the eighteenth day of May, A. D. one thousand eight hundred and ninety-one.

RICHARD A. McCURDY, *President.*

C. F. SCHRODER,
Ass't Secretary.

The receipt of the first payment of premium hereon is acknowledged.

W. J. EASTON, *Secretary.*

Provisions, Requirements, and Benefits.

Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president and secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided.

Dividends.—This policy is issued on the twenty-year distri-
7 bution plan. It will be credited with its distribution share of surplus apportioned at the expiration of twenty years from the date of issue. Only twenty-year distribution policies in force at the end of such term, and entitled thereto by year of issue, shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied at the end of such period to purchase additional insurance, or may then be drawn in cash. After the expiration of the period of twenty years hereinabove provided for the dividend distribution periods shall be changed to terms of five years each during the continuance of this policy. The surplus may be applied at each distribution to purchase additional insurance without medical examination, provided such application of the surplus be elected in due form not less than two years before the end of the first dividend period of twenty years; otherwise a satisfactory examination will be required for each such application of the surplus. But should the owner of the policy at the end of said first period of twenty years or at the end of any subsequent period of five years elect to receive the dividends annually, the surplus applicable on this policy will thereafter be apportioned at the beginning of each year on the anniversary of the date of this policy and may be applied as hereinbefore provided.

Paid-up policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up in-
surance, payable as herein provided, for the proportion of
8 the amount of this policy which the number of full year's premiums paid bears to the total number required.

Surrender.—This policy may be surrendered to the company at the end of the first period of twenty years, and the full reserve computed by the American table of mortality, and four per cent.

interest, and the surplus as defined above, will be paid therefor in cash.

Insurance, with annuity.—If the policy be surrendered at the end of the first dividend period as above provided, the company will if requested in writing apply its cash value, to purchase, without medical examination, a paid-up policy for the same amount as the value so applied, securing insurance for life and participating annually in dividends together with paid-up annuity for life equal to three and one-half per cent. per annum of the amount of the paid-up insurance, payments of the annuity to commence one year after the end of said first dividend period.

Incontestability.—It is hereby further promised and agreed that, after two years from date hereof, the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums, at the times and place, and in the manner stipulated in said policy, and that the requirements of the company as to age, and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years the payment of the sum insured by this policy shall not be disputed.

9 Notice to the holder of this policy.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignment of this policy until the original assignment or duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

39 B.
Man's life. Lim. paym't.
Twenty-year dist.
June, 1889.

Filed in the United States circuit court, Sept. 28, 1898.

A. REEVES AYRES, *Clerk.*
SAML D. BRIDGES, *Deputy.*

And afterward, to wit, on the twenty-third day of November, 1898, there was duly filed in said court in said cause a motion to make more definite and certain in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW York, Defendant.
No. 609.

10 *Motion to Make More Definite and Certain.*

Comes now the above-named defendant, and moves the court to require said plaintiff to make her complaint, and particularly paragraph VI thereof, more definite and certain, in this:

That the said plaintiff be required to state whether the said Stephen P. Sears in his lifetime made or caused to be made payment of the annual premium of four hundred and ninety-one dollars, becoming due on the policy referred to in said complaint each year subsequent to the delivery of said policy at the time in said policy provided and, if payment was not so made, to require the plaintiff to state what, if any, payments of premium were made upon said policy subsequent to the delivery thereof.

II.

And in case the said Stephen P. Sears in his lifetime failed to pay all or any of the premiums falling due upon said policy subsequent to the delivery thereof, whether the said plaintiff has ever tendered or offered to make payment of any premium upon said policy unpaid at the time of the death of said Stephen P. Sears.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

Copy of within motion received and due service of same acknowledged this tenth day of November, 1898.

S. WARBURTON,
Attorney for Plaintiff.

Filed in the United States circuit court, Nov. twenty-third, 1898.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

11 At a stated term of the United States circuit court for the district of Washington, western division, held at the court-room in the city of Tacoma, on Wednesday, the twenty-third day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable C. H. Hanford, United States district judge, presiding in said circuit court.

BESSIE F. SEARS, as Executrix, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
No. 609.

Order Denying Motion to Make More Definite and Certain.

This cause came regularly on for hearing at this time upon motion of the defendant to make the complaint herein more definite and certain. The court being fully advised in the premises,

It is ordered that the said motion be and the same is hereby denied, to which ruling of the court the defendant excepts and its exception is hereby allowed.

Filed in the United States circuit court, Nov. 23, 1898.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the twenty-ninth day of April, 1899, there was duly filed in said court in said cause an answer in the words and figures following to wit:

12 In the Circuit Court of the United States, District of Washington, Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
No. 609.

Answer to Complaint.

Comes now the above-named defendant and makes the following answer to the complaint herein:

I.

For answer to paragraph III of said complaint, defendant denies that the said contract was made or delivered in the city or State of New York, and denies that said application for said policy contained the agreement or condition that the same was made subject to the charter of the company and the laws of the State of New York, but admits that there is contained in said application, the following:

"This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York."

13 II.

For answer to paragraph VI of said complaint, defendant denies the same, and each and every allegation therein contained.

III.

For answer to paragraph VIII of said complaint, defendant denies the same, and each and every allegation in said paragraph contained.

IV.

For answer to paragraph IX of said complaint, defendant denies the same, and every allegation in said paragraph contained.

And by way of a further and first affirmative answer and defense herein, defendant alleges:

I.

That the said defendant is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New York, for the purpose of carrying on a life-insurance business.

II.

That prior to and ever since the eighteenth day of May, 1891, the defendant has been engaged in carrying on its business of life insurance in the State of Washington, and has had during the said time and now has an agent representing it in said State, conducting its said business, and during said times had its soliciting insurance agents and medical examiners residing in said State of Washington, and has complied with the laws of said State of Washington relating to foreign corporations transacting business therein.

14 III.

That immediately prior to the eighteenth day of May, 1891, at Tacoma, in the State of Washington, defendant's agent solicited insurance on the life of one Stephen P. Sears, and in pursuance thereof the said Stephen P. Sears made his application to this defendant for insurance upon his life in the sum of ten thousand dollars ($10,000). And thereupon the said Sears submitted himself at said city of Tacoma, State of Washington, to the medical examiner of this defendant and was there examined for such life insurance. That the said application, together with said physical examination of said Stephen P. Sears, was forwarded to the home office of this defendant in the city and State of New York, and thereupon said policy of life insurance upon the life of said Sears in the sum of ten thousand dollars was duly made and executed by this defendant, in consideration of the payment of the sum of $491, to be paid to this defendant at the time and place of the delivery of said policy to said Stephen P. Sears and the payment on the eighteenth day of May of each succeeding year, until ten annual payments should be made, and that the said policy of insurance is the identical policy pleaded and set forth by way of exhibit in plaintiff's complaint.

IV.

That afterward, and on the eighteenth day of May, 1891, this defendant, through its agent residing at the city of Tacoma, duly delivered the said policy to the said Stephen P. Sears upon the payment there by said Sears to defendant of the sum of $491,
15 and the said policy then and there by its terms became operative and a binding contract between the said parties.

V.

That the said Sears, on the eighteenth day of May, 1892, made payment of the premium due on said policy on that date, but wholly neglected, failed and refused to pay any subsequent premium on said policy, or any part of any such premium, or anything whatever on account thereof, and never has paid anything whatever on account of premiums upon said policy subsequent to the annual premium falling due thereon in the month of May, 1892, but has wholly made default respecting said payment; and that by reason of said neglect, failure and default on the part of the said Stephen P. Sears, the said policy became lapsed and void, and was by this defendant, prior to the death of said Stephen P. Sears, declared by it to be lapsed, forfeited and void, and so entered upon the books and records of this defendant.

VI.

That on or about the thirtieth day of March, 1898, the said Stephen P. Sears died at said city of Tacoma, State of Washington.

By way of a second and further affirmative answer and defense, defendant alleges:

I.

That the said defendant is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New York, for the purpose of carrying on a life-insurance business.

16 II.

That prior to and ever since the eighteenth day of May, 1891, the defendant has been engaged in carrying on its business of life insurance in the State of Washington, and has during the said time and now has an agent representing it in said State, conducting its said business, and during said times had its soliciting insurance agents and medical examiners residing in said State of Washington, and has complied with the laws of said State of Washington relating to foreign corporations transacting business therein.

III.

That immediately prior to the eighteenth day of May, 1891, at Tacoma, in the State of Washington, defendant's agent solicited insurance on the life of one Stephen P. Sears, and in pursuance thereof the said Stephen P. Sears made his application to this de-

fendant for insurance upon his life in the sum of ten thousand dollars. And thereupon the said Sears submitted himself at said city of Tacoma, State of Washington, to the medical examiner of this defendant and was there examined for such life insurance. That the said application, together with said physical examination of said Stephen P. Sears was forwarded to the home office of this defendant in the city and State of New York, and thereupon said policy of life insurance upon the life of said Sears in the sum of ten thousand dollars, was duly made and executed by this defendant, in consideration of the payment of the sum of $491, to be paid to this defendant at the time and place of the delivery of said policy to said Stephen P. Sears and the payment on the eighteenth
17 day of May of each succeeding year, until ten annual payments should be made, and that the said policy of insurance is the identical policy pleaded and set forth by way of exhibit in plaintiff's complaint.

IV.

That afterward, and on the eighteenth day of May, 1891, this defendant, through its agent residing at the city of Tacoma, duly delivered the said policy to the said Stephen P. Sears upon the payment there by said Sears to defendant of the sum of $491, and that the said policy then and there by its terms became operative and a binding contract between the said parties.

V.

That the said Sears, on the eighteenth day of May, 1892, made payment of the premium due on said policy on that date, but wholly neglected, failed and refused to pay any subsequent premium on said policy, or any part of any such premium, or anything whatever on account thereof, and never has paid anything whatever on account of premiums upon said policy subsequent to the annual premium falling due thereon in the month of May, 1892, but has wholly made default respecting said payment; and that by reason of said neglect, failure and default on the part of the said Stephen P. Sears, the said policy became lapsed and void and was by this defendant, prior to the death of said Stephen P. Sears declared by it to be lapsed, forfeited and void, and so entered upon the books and records of this defendant.

18 VI.

That subsequent to the failure of the said Stephen P. Sears to make payment of the said annual premium falling due on said policy, May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after the said Stephen P. Sears was fully informed and knew that said policy had been by it declared lapsed and void for non-payment of premium, this defendant, through its agents, applied to said Stephen P. Sears to make restoration of said policy by making payment of said defaulted premium and having the said policy restored to force, but that said

Stephen P. Sears refused to make such payment and refused longer to continue said policy or make any further payments thereon, and then and there elected to have the same terminated, and this defendant, relying upon the said election and determination of said Stephen P. Sears, at all times subsequent thereto treated said policy as lapsed, abandoned and terminated, and relying upon the said conduct of said Sears abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof.

Wherefore, defendant prays that plaintiff take nothing by her said action, and that defendant be dismissed and recover its costs and disbursements herein.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

STATE OF WASHINGTON, } ss:
County of King, }

A. W. Engle, being first duly sworn, on oath deposes and
19 says: That he is an agent of the said defendant, The Mutual Life Insurance Company of New York, duly authorized by said company to solicit insurance in the State of Washington, and as such makes this affidavit in verification of the foregoing answer on behalf of the said defendant. That he has read the said answer, knows the contents thereof and believes the same to be true.

A. W. ENGLE.

Subscribed and sworn to before me this twenty-ninth day of April, 1899.

H. J. RAMSEY,
Notary Public in and for the State of Washington, Residing at Seattle.

Copy of within answer received and due service of same acknowledged this twenty-ninth day of April, 1899.

S. WARBURTON,
Attorney for Plaintiff.

Filed in the United States circuit court, April 29, 1899.

A. REEVES AYRES, *Clerk.*
SAML D. BRIDGES, *Deputy.*

20 And afterward, to wit, on the twenty-ninth day of April, 1899, there was duly filed in said court in said cause a demurrer to answer in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Demurrer to Answer.

Comes now the plaintiff by her attorney, and demurs to the answer of the defendant herein as follows:

I.

Demurs to the first affirmative defense of said answer on the ground that the same does not state facts to constitute a defense to plaintiff's complaint.

II.

Demurs to the second affirmative defense of said answer on the ground that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.

21 III.

Demurs to said answer generally on the ground that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.

S. WARBURTON,
Attorney for Plaintiff,
310 *Fidelity Building, Tacoma, Washington.*

UNITED STATES OF AMERICA,
District of Washington, Western Division.

S. Warburton, being the attorney for the plaintiff in the above-entitled cause, believes the foregoing demurrer is well founded in point of law.

S. WARBURTON.

Filed in the United States circuit court, April 29, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the first day of May, 1899, there was duly filed in said court in said cause an order sustaining demurrer and judgment in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

22 *Order Sustaining Demurrer and Judgment.*

This cause coming on to be heard on the plaintiff's demurrer to the defendant's answer herein, and the court having heard the argument of counsel thereon, and having considered the same, and being fully advised in the premises:

It is ordered that said demurrer be and the same is hereby sustained, to which ruling of the court, sustaining said demurrer, defendant by its counsel in open court at the time duly excepts, and its exception is separately allowed by the court as to each of the grounds of the demurrer.

Thereupon the defendant, by its counsel in open court, announces that it does not desire to amend its answer, but elects to stand thereon, and refuses to plead further; whereupon the plaintiff, by her counsel, moves the court for judgment in favor of the plaintiff and against the defendant upon said demurrer; and the court being now fully advised in the premises, grants said motion and orders judgment accordingly, to which action of the court in granting said motion for judgment and ordering judgment defendant at the time excepts, and its exception is allowed.

It is now therefore considered, adjudged, and decreed that the plaintiff, Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, do have and recover of and from the defendant, The Mutual Life Insurance Company of New York, the sum of seven thousand four hundred forty-eight and ninety-four one-hundredths dollars ($7,448.94), with interest thereon from the date thereof, together with the costs of this action, taxed at
23 twenty-one and fifty-two one-hundredths ($21.52) dollars, and that execution issue therefor. To which judgment and every part thereof defendant at the time excepts, and its exception is allowed.

Done in open court this twenty-ninth day of April, 1899.

C. H. HANFORD, *Judge.*

Filed in the United States circuit court, May 1, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause an assignment of errors in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
vs.
BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Defendant in Error. } No. 609.

Assignment of Errors.

In the matter of the petition of The Mutual Life Insurance Company of New York, plaintiff in error.

24 Comes now the above-named plaintiff in error, Mutual Life Insurance Company of New York, on this fifth day of May, 1899, by its attorneys, Edward Lyman Short, and Struve, Allen, Hughes & McMicken, and says that in the record and proceedings in the above-entitled matter there is manifest error, of which it makes the following assignment of error in the above-entitled cause, to wit:

I.

The circuit court of the United States for the district of Washington, western division, erred in sustaining the demurrer of the plaintiff and defendant in error to the first affirmative answer and defense of defendant and plaintiff in error, The Mutual Life Insurance Company of New York, a corporation.

II.

The circuit court of the United States for the district of Washington, western division, erred in sustaining the demurrer of the plaintiff and defendant in error to the second affirmative answer and defense of defendant and plaintiff in error, The Mutual Life Insurance Company of New York, a corporation.

III.

The said circuit court erred in sustaining the demurrer of said plaintiff and defendant in error to the answer of defendant and plaintiff in error.

IV.

The said circuit court erred in granting judgment in favor of said plaintiff and defendant in error against said defendant
25 and plaintiff in error for the amount of said judgment, or any sum, because it is manifest upon the issues formed in said cause that said plaintiff and defendant in error was not entitled to judgment.

V.

The said circuit court erred in not submitting said cause to trial upon the issues formed by the pleadings.

Wherefore the said plaintiff in error prays that the judgment of

the said circuit court of the United States for the district of Washington, western division, be reversed, and that the said circuit court of the United States be ordered to enter an order reversing and setting aside said judgment, and granting a new trial in said cause.

EDWARD LYMAN SHORT AND
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Plaintiff in Error.

Copy of foregoing assignment of errors received and service of same acknowledged at Tacoma, Washington, this fifth day of May, 1899.

S. WARBURTON,
Attorney for Bessie Sears, as Executrix, Defendant in Error.

Filed in the United States circuit court, district of Washington, May 5, 1899.

A. REEVES AYRES, *Clerk.*
H. M. WALTHEW, *Deputy.*

26 And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a petition for writ of error in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division, Ninth Circuit.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
No. 609.

Petition for Order Allowing Writ of Error.

The said defendant, The Mutual Life Insurance Company of New York, a corporation, feeling itself aggrieved by the judgment entered in said cause on the first day of May, 1899, in favor of said plaintiff and against said defendant for the sum of seven thousand four hundred forty-eight and ninety-four one-hundredths dollars, and twenty-one and fifty-two one-hundredths dollars costs, in which judgment and the proceedings leading up to the same, certain errors were committed, to the prejudice of the said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said court for an order allowing the said defendant to prosecute a writ of error to the honor-

27 able United States circuit court of appeals for the ninth circuit, for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of

error, and that upon the furnishing of said security all further proceedings in this cause may be suspended and stayed until the determination of said writ of error by said circuit court of appeals for the ninth circuit. And further prays that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the said circuit court of appeals, and your petitioner will ever pray.

Dated this fifth day of May, 1899.

EDWARD LYMAN SHORT AND
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for the Defendant, The Mutual Life Insurance Company of New York, a Corporation.

Copy of foregoing petition for order allowing writ of error received, and service of same acknowledged at Tacoma, Washington, this fifth day of May, 1899.

S. WARBURTON,
Attorney for Bessie F. Sears, Executrix.

Filed in the United States circuit court, district of Washington May 5, 1899.

A. REEVES AYRES, *Clerk.*
H. M. WALTHEW, *Deputy.*

28 And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause an order allowing writ of error in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division, Ninth Circuit.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff, *vs.* THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	No. 609.

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the court-room of said court in the city of Tacoma, Washington, upon the petition of the defendant, The Mutual Life Insurance Company of New York, a corporation, herein filed, praying the allowance of a writ of error to the United States circuit court of appeals for the ninth circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States circuit court of appeals for the ninth circuit, and that such other and further proceedings may be had as may be proper in the premises.

29 The court having duly considered the same, does hereby allow the said writ of error prayed for, and it is ordered that upon the giving by said defendant, The Mutual Life Insurance Company of New York, a corporation, of a bond according to law, in the sum of eight thousand five hundred dollars, the same shall operate as a supersedeas bond and all proceedings be stayed, pending the determination of said writ of error.

Dated this fifth day of May, 1899.

C. H. HANFORD, *Judge.*

Copy of foregoing order received and service of same acknowledged this fifth day of May, 1899.

S. WARBURTON,
Attorney for Plaintiff.

Filed in the United States circuit court May 5, 1899.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a supersedeas bond in the words and figures following, to wit:

30 In the Circuit Court of the United States for the District of Washington, Western Division, Ninth Circuit.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 609.

Supersedeas Bond.

Know all men by these presents, that we, The Mutual Life Insurance Company of New York, a corporation, the above-named defendant, as principal, and Jacob Furth and E. C. Neufelder of Seattle, King county, Washington, as sureties, are held and firmly bound unto Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, the above-named plaintiff, in the sum of eight thousand five hundred dollars, to be paid to said plaintiff, her executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this fifth day of May, 1899.

31 The condition of the above obligation is such that whereas in the above court and cause, final judgment was rendered against the said defendant and in favor of said plaintiff, in the sum of seven thousand four hundred forty-eight and ninety-four one-hundredths dollars, with interest and costs, and Whereas, the said defendant has obtained from said court a writ of error to reverse the judgment in said action, and a citation di-

rected to the plaintiff is about to be issued citing and admonishing her to be and appear in the United States circuit court of appeals, for the ninth circuit, to be held at San Francisco, in the State of California:

Now, therefore, if the said defendant, The Mutual Life Insurance Company, a corporation, of New York, shall prosecute this said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, [SEAL.]
By SHERWOOD GILLESPY,
Its General Agent for the State of Washington,
And by STRUVE, ALLEN, HUGHES & McMICKEN,
Its Attorneys.

JACOB FURTH. [SEAL.]
E. C. NEUFELDER. [SEAL.]

[Cancelled U. S. revenue stamp.]

UNITED STATES OF AMERICA, }
District of Washington, King County, } *ss:*

32 Jacob Furth and E. C. Neufelder, sureties on the foregoing bond, being each duly sworn, each for himself deposes and says: That he is — freeholder in said district, and that he, the said Furth, is worth the sum of eight thousand five hundred dollars; and that he, the said E. C. Neufelder, is worth the sum of eight thousand five hundred dollars, and in each case exclusive of property exempt from execution, and over and above all debts and liabilities.

JACOB FURTH.
E. C. NEUFELDER.

Subscribed and sworn to before me this fifth day of May, 1899.
A. C. BOWMAN,
United States Commissioner.

[Seal of U. S. Commissioner.]

[Cancelled U. S. revenue stamp.]

The sufficiency of the sureties of the foregoing bond approved by me this fifth day of May, 1899.

C. H. HANFORD,
Judge of said Court.

Copy of the foregoing bond received, and service of same acknowledged at Tacoma, Washington, this fifth day of May, 1899.
S. WARBURTON,
Attorney for Plaintiff.

Filed in the United States circuit court May 5, 1899.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

33 And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a writ of error in the words and figures following, to wit:

Writ of Error (Copy).

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint; we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you may have the same at the said place before the justice aforesaid, on the third day of June, 1899, that the record and proceedings aforesaid
34 being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

[U. S. Circuit Court Seal.]

The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Received, this fifth day of May, 1899, a true copy of the foregoing writ of error, for defendant in error, Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States
for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

[U. S. Circuit Court Seal.]

35 Filed in the United States circuit court May 5, 1899.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a copy of writ of error in the words and figures following, to wit:

Writ of Error (*Copy*).

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said circuit court, before you or some of you, between Bessie F. Sears, deceased, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice
36 of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you may have the same at the said place before the justice aforesaid on the third day of June, 1899, that, the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and

of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

[United States Circuit Court Seal.]

The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Filed in the United States circuit court May 5, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

37 And afterward, to wit, on the fifth day of May, 1899, there was duly filed in said court in said cause a citation in the words and figures following, to wit:

Citation (Copy).

UNITED STATES OF AMERICA, *ss:*

To Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, State of California, on the third day of June, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Washington, western division, wherein The Mutual Life Insurance Company of New York, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the fifth day of May, 1899.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

[U. S. Circuit Court Seal.]

Attest:
A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

38 We hereby, this fifth day of May, 1899, acknowledge service of the foregoing citation at Tacoma, Washington.

S. WARBURTON,
Counsel for Bessie F. Sears, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased.

Filed in the United States circuit court May 5, 1899.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Deputy.*

In the Circuit Court of the United States for the District of Washington, Western Division.

BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
} No. 609.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, }
District of Washington, } *ss.:*

I, A. Reeves Ayres, clerk of the circuit court of the United States for the ninth circuit, district of Washington, do hereby certify that the foregoing pages, numbered from one to thirty-eight, both inclusive, constitute and are a complete, true, and correct copy of the record, papers and all proceedings had in the above-entitled cause as the same remains of record and on file in the office of said
39 circuit court, and that the same which I transmit constitutes my return to the annexed writ of error, lodged and filed in my office on the fifth day of May, 1899. I also hereto annex and herewith transmit the original citation in said cause.

I further certify that no opinion of the court was rendered or filed in said cause.

I further certify that the costs of preparing and certifying the foregoing transcript of record and return is the sum of $19.95, and that the same has been paid to me in full by Struve, Allen, Hughes & McMicken, attorneys for the plaintiff in error.

In testimony whereof, I have hereunto set my hand and the seal of the said circuit court the twelfth day of May, 1899.

A. REEVES AYRES,
Clerk United States Circuit Court for the District of Washington, Ninth Circuit,
By SAM'L D. BRIDGES,
Deputy Clerk.

[SEAL.]

[Cancelled 10-ct. int. rev. stamp.]

Writ of Error (Original).

UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

40 Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint; we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the third day of June, 1899, that the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand eight hundred and ninety-
41 nine, and of the Independence of the United States, the one hundred and twenty-third.

[SEAL.] A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Received, this fifth day of May, 1899, a true copy of the foregoing writ of error, for defendant in error, Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased.

[SEAL.] A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

(Endorsed:) Original. In the United States circuit court of appeals for the ninth circuit. The Mutual Life Insurance Co. of New York, plaintiff in error, *vs.* Bessie F. Sears, as executrix, defendant in error. Writ of error. Filed in the United States circuit court May 5, 1899. A. Reeves Ayres, clerk. Sam'l D. Bridges,
42 deputy. Edward Lyman Short and Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error.

Citation (Original).

UNITED STATES OF AMERICA, *ss:*

To Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, Greeting:

You are hereby cited and admonished to be and appear at a term of the *the* United States circuit court of appeals, for the ninth circuit, to be holden in the city of San Francisco, State of California, on the third day of June, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the district of Washington, western division, wherein The Mutual Life Insurance Company of New York, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the fifth day of May, 1899.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Attest:
[SEAL.] A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

43 We hereby, this fifth day of May, 1899, acknowledge service of the foregoing citation at Tacoma, Washington.

S. WARBURTON,
Counsel for Bessie F. Sears, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased.

(Endorsed:) Original. In the United States circuit court of appeals for the ninth circuit. The Mutual Life Insurance Co. of New York, plaintiff in error, *vs.* Bessie F. Sears, as executrix, defendant in error. Citation. Filed in the United States circuit court May 5, 1899. A. Reeves Ayres, clerk. Sam'l D. Bridges, deputy. Edward Lyman Short and Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error.

(Endorsed:) No. 541. In the United States circuit court of appeals

or the ninth circuit. The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *vs.* Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, defendant in error. In error to the circuit court of the United States for the district of Washington, western division. Transcript of record. Filed May 17, 1899. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

44 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation) *vs.* BESSIE F. SEARS, as Executrix, etc. } No. 541.

Order of Submission.

Ordered cause argued by John B. Allen and R. C. Strudwick, Esquires, counsel for the plaintiff in error, and Stanton Warburton, Esquire, counsel for the defendant in error, and submitted to the court for consideration and decision.

45 In the United States Circuit Court of Appeals, Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error, *vs.* BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Defendant in Error. } No. 541.

Opinion U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of Washington, western division.

Edward Lyman Short and John B. Allen, for plaintiff in error; Struve, Allen, Hughes & McMicken, of counsel.
S. Warburton, for defendant in error.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

The facts in this case in so far as they bear upon the question of the policy of insurance herein sued upon, being a New York contract and governed by the laws of that State as to the forfeiture of

the policy, are identical with the facts presented in Mutual Life Insurance Company *vs.* Hill, *ante*. The other facts presented by the pleadings are as follows:

46 On May 18, 1891, the Mutual Life Insurance Company of New York issued a policy of insurance upon the life of Stephen P. Sears in the sum of ten thousand dollars, upon which an annual premium of four hundred and ninety-one dollars was to be paid for ten years. Sears paid the first premium upon the delivery of the policy in 1891. He paid the second premium when due May 18, 1892, and the policy by its terms then became an operative and binding contract between the parties. He never paid any other premium, or any part or portion thereof. Owing to his failure to pay any further premium, the insurance company declared the policy lapsed, forfeited and void, and so entered it upon its books and records. After Sears failed to pay the annual premium due May 18, 1893, and after he was informed that said policy had been, by the insurance company, declared lapsed and void for non-payment of the premium, an agent of the insurance company applied to him to make restoration of said policy by making payment of said defaulted premium. But Sears refused to make such payment and elected to have the policy terminated, and for this reason the insurance company never took any further steps in relation to the policy by way of notice or otherwise, in order to effect the cancellation and termination thereof.

On March 30, 1898, Sears died. Prior to his death he made his will, appointing his wife, Bessie F. Sears, executrix of his estate. This will was admitted to probate, April 30, 1898, and the executrix appointed thereunder duly qualified and entered upon her duties. On June 14, 1898, the executrix notified the insurance company of Sears' death, enclosing due and sufficient proofs thereof.

47 On June 23, 1898, she received a reply from the company acknowledged receipt of the notice and proofs of death. On September 19, 1898, she commenced this action. Upon these facts, admitted by the pleadings, it is clear that the court did not err in sustaining the demurrer to the answer and rendering judgment in favor of the executrix for $7,448.94, with interest and costs. There was no issue raised by the pleadings. The parties could not waive the provisions of the statute of New York, which expressed the conditions upon which the policy might be forfeited for non-payment of premiums. The New York statute has been regarded as indicative of the legislative will and intent that life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the mode prescribed by the statute.

Upon the authority of The Mutual Life Insurance Company *vs.* Hill, and of the authorities there cited, the judgment of the circuit court is affirmed, with costs.

(Endorsed:) Opinion. Filed Oct. 2, 1899. F. D. Monckton, clerk.

48 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,
vs.
BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Defendant in Error. } No. 541.

Judgment U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of Washington, western division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, western division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed Oct. 2, 1899. F. D. Monckton, clerk.

49 At a stated term, to wit, the October term, A. D. 1899, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the ninth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation)
vs.
BESSIE F. SEARS, as Executrix, etc. } No. 541.

Order Staying Mandate.

Upon motion of Warren Gregory, Esquire, ordered mandate herein stayed until the further order of the court.

50 United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
vs.
BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Defendant in Error. } No. 541.

Clerk's Certificate to Transcript U. S. Circuit Court — Appeals.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing forty-nine (49) pages, numbered from one (1) to forty-nine (49), inclusive, to be a full, true and correct copy of the transcript of the record, the order of submission, the opinion, the judgment, the order staying mandate in the above-entitled cause, as the originals thereof remain and appear of record in my office, and that the same together constitutes a copy of the entire record of the case in said United States circuit court of appeals for the ninth circuit.

51 Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this fourteenth day of October, A. D. 1899.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Oct. 14, '99. F. D. M.]

52 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error and Bessie F. Sears, executrix of the last will and testament of Stephen P. Sears, deceased, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of February, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 452, October term, 1899. The Mutual Life Ins. Co. of New York *vs.* Bessie F. Sears, executrix, &c. Writ of certiorari. Filed Feb. 15, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY, Petitioner and Plaintiff in Error, *vs.* BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased.	No. 541.

Stipulation as to Return of the Writ of Certiorari.

It is, this 16th day of February, A. D. 1900, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause, heretofore submitted to the Supreme Court of the United States with the petition for a writ of certiorari, may be filed in the said Supreme Court, and may be received and considered by that court as the transcript of the record in said cause as though the same had been

returned by the clerk of the circuit court of appeals for the ninth circuit in obedience to the writ of certiorari granted February 6th, 1900.

STRUVE, ALLEN, HUGHES & McMICKEN, AND STRUDWICK & PETERS.
Attorneys for Petitioner and Plaintiff in Error.
S. WARBURTON,
Attorney for Respondent and Defendant in Error.

(Endorsed:) Stipulation as to return to writ of certiorari. Filed Feb. 20, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a full, true, and correct copy of a stipulation entered into between the respective counsel, filed in the cause entitled The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *v.* Bessie F. Sears, as executrix, etc., No. 541, as the original thereof remains of record in my office.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Plaintiff in Error,
v.
BESSIE F. SEARS, as Executrix, etc., Defendant in Error. } No. 541.

Return to Writ of Certiorari.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari, issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above-entitled cause, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 16th day of February, 1900, the

original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

[Endorsed:] Case No. 17,566. Supreme Court U. S., October term, 1899. Term No., 452. The Mutual Life Ins. Co. of New York, petitioner, *vs.* Bessie F. Sears, executrix, &c. Writ of certiorari and return thereto. Office Supreme Court U. S. Filed Mar. 10, 1900. James H. McKenney, clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PLAINTIFF IN ERROR, *vs.* BESSIE F. SEARS, AS EXECUTRIX of the Last Will and Testament of STEPHEN P. SEARS, DECEASED, DEFENDANT IN ERROR.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

The PETITION of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, respectfully shows to this Honorable Court as follows:

I.

That your petitioner is a mutual life insurance company, created and chartered under and by virtue of an act of the Legislature of the State of New York of April 12th,

1842, entitled, "An Act to incorporate The Mutual Life Insurance Company of New York," and a citizen of said State, with its principal office in the City of New York.

That in the year 1876, the Legislature of the State of New York enacted a general statute entitled: "An Act regulating the forfeiture of life insurance policies" (Laws 1876, Chap. 341), as follows:

CHAPTER 341.

AN ACT regulating the forfeiture of life insurance policies.

Passed May 15, 1876.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last known post office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy.

SEC. 2. The affidavit of any officer, clerk, or agent of the company that the notice to the assured, provided for in Section 1, has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notice having been duly given.

SEC. 3. This act shall take effect immediately.

This statute was amended by the following statute of 1877 :

CHAP. 321.

"AN ACT to amend chapter three hundred and forty-one of the laws of 1876, entitled "An act regulating the forfeiture of life insurance policies."

Passed May 23, 1877.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS :

SECTION 1. Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled 'An act regulating the forfeiture of life insurance policies,' is hereby amended so as to read as follows :

"SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or

to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given.

If this New York statute governed this policy at all *which we deny*, then the above act of 1877 governed the premium due *May 18, 1892*, the second premium, which was paid.

The Legislature of New York thereafter repealed the above acts by Chapter 690 of the Laws of New York for 1892, which went into effect October 1st, 1892, and by the same act of 1892, legislated as follows:

"Sec. 92. No Forfeiture of Policy Without Notice. No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed sed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day when it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of

such notice. The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

If this New York statute governed the policy at all, *which we deny*, then the above act of *1892* governed the premiums due dates, May 18, *1893*, *1894*, *1895*, and *1896*, the third, fourth, fifth and sixth premiums, none of which were paid.

This section was amended by Chapter 218, Laws 1897, so as to read as follows, taking effect *April 8, 1897*.

The same statute (Ch. 690, L. 1892) enacted the following section:

CHAP. 218.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * * * *

§ 2. Section ninety-two of said chapter is hereby amended so as to read as follows:

"SEC. 92. NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall within one year after the default in payment of any premium, installment or interest declare forfeited or lapsed—any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one

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year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action

shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

SEC. 3. This act shall take effect immediately."

If this New York statute governed this policy at all *which we deny*, then the above act of 1897 governed the premium due May 18, 1897, the seventh premium, which was not paid.

That in an act of the Legislature of the State of Washington, entitled, "An act relating to foreign corporations and to repeal certain laws in connection therewith," approved March 28th, 1890, the following provisions are contained:

"Section 1. That any corporation incorported under the laws of any state or territory in the United States, or of any foreign country, state or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby anthorized to sue and to be sued in any court having competent jurisdiction; to acquire, purchase, hold, mortgage, sell, convey or otherwise dispose of in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate by mortgage or otherwise due to, or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally to do and perform every act and transact every kind of business within this state, in the same manner and to the same extent as corporations incorporated

and organized under the laws of this state, are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the second and third sections of this act."

That prior to the 18th day of May, 1891, your petitioner was transacting business in the Territory, now State, of Washington, and in compliance with the requirements of such statute had filed and recorded in the office of the Secretary of said State a duly certified copy of its charter, and had also constituted and appointed F. L. Stinson, residing at Seattle, in said State, its agent, that being the place where the principal business of your petitioner was carried on in said State.

II.

Your petitioner states that prior to the 18th day of May, 1891, *and until his death, March 30, 1898*, one Stephen P. Sears, resided in the City of Tacoma, and was a citizen of the State of Washington.

That prior to the 18th day of May, 1891, the said Stephen P. Sears, at Tacoma, made to your petitioner his application in writing for a policy of life insurance upon his life in the sum of $10,000, and there underwent the usual medical examination. That said application provided that the policy to be issued pursuant to it should not take effect until the first premium had been paid, and the policy had been delivered during the applicant's continuance in good health, and that the application was made subject to the charter of the company and the laws of the State of New York. That after signing said application said Stephen P. Sears delivered it at Tacoma to F. L. Stinson, the petitioner's agent, who transmitted the same to the petitioner's home office at the City of New York. Upon said

application the petitioner executed its policy on the life of said Sears bearing date May 18th, 1891, and forwarded the same by mail to its agent at Tacoma, and said Stephen P. Sears at Tacoma paid the first annual premium on said policy and the same was there delivered to him by your petitioner through its said agent.

The following, excepting provisions of the contract not affecting this case, is substantially a copy of said policy of insurance:

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

No. 453,516. Amount $10,000.

Man's Life, Limited Payment, Twenty-Year Distribution Policy, Age 31 Years. Annual Premium for 10 Years, $491.

In consideration of the application of this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the City of New York, unto Stephen P. Sears, of Tacoma, in the County of Pierce, State of Washington, his executors, administators or assigns, ten thousand dollars, upon acceptance of satisfactory proof at its home office, of the death of said Stephen P. Sears during the continuance of this policy, upon the condition, and subject to the provisions, requirements and benefits stated on the back of this policy which are hereby referred to and made part hereof:

The annual premium of four hundred and ninety-one dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the City of New York, on the eighteenth day of May in every year during the continuance of this contract,

until premiums for ten years shall have been duly paid to said company.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its President and Secretary, at its office in the City of New York, the eighteenth day of May. A. D., one thousand eight hundred and ninety-one.

RICHARD A. McCURDY, President.
C. F. SCHRODER, Asst. Secretary.

The receipt of the first payment of premium hereon is acknowledged. W. J. EASTON, Secretary.

"Provisions, Requirements and Benefits.

"Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any stat ute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void for non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

That said insured never paid any premium subsequent to the first, and upon default in the payment of the second annual premium the policy was entered upon the books of your petitioner as lapsed and forfeited, and your petitioner, through its agent, applied to said Stephen P. Sears

personally to make restoration of his policy by paying the defaulted premiums, but he advised your petitioner's agent that he would neither renew the policy nor make any further payment of premiums upon it.

III.

Your petitioner further states that after the death of the insured at Tacoma, March 30th, 1898, an action was commenced *on September 28, 1898*, by defendant in error to recover Ten Thousand Dollars, the amount of the policy, with interest, in the United States Circuit Court for the District of Washington, Western Division, in her complaint setting forth the policy of insurance, and alleging compliance with its terms on the part of the insured during his life time. This action was commenced more than *six years* after the first default and *sixteen months* after the default in the premium due *May 18, 1897*, which was the last premium due before the insured's death, *March 30, 1898*. Your petitioner in said action admitted the execution of the policy, but denied the same was executed in the State of New York, or elsewhere than in the State of Washington, and controverted compliance on the part of the insured or plaintiff in the action with the terms and conditions of the policy, and alleged affirmatively that the insured failed, neglected and refused to pay the premium due on the policy May 18th, 1893, *and never paid anything whatever on account of subsequent premiums*, and that on account thereof the said policy lapsed and your petitioner caused it to be entered upon its books and records as a lapsed and forfeited policy. Your petitioner also pleaded that the insured was from the date of the application until his death a resident of Tacoma, and a citizen of Washington. That he had

made his application for insurance to your petitioner's agent at Tacoma, and had there undergone medical examination pursuant to the application. That his application was transmitted to your petitioner by mail to New York, and the policy issued thereon was transmitted to your petitioner's agent at Tacoma, and thereupon the payment of the first annual premium of Four Hundred and Ninety-one Dollars, delivered to the said Stephen P. Sears.

That subsequent to May 18th, 1893, your petitioner informed said Stephen P. Sears that said policy had been declared and entered lapsed and void for non-payment of premiums as aforesaid, and through its agents applied to said Sears to make restoration of said policy and offered to renew the same upon payment of defaulted premiums, but that said Sears refused either to make said payment or to have such policy renewed, or to longer continue the policy, and then and there informed your petitioner that he elected to have said policy terminated, and your petitioner, relying upon such election and representations on the part of said Sears, at all subsequent times treated said policy as lapsed, abandoned and terminated, and relying upon the conduct and representation of said insured abstained from taking any further action in relation to said policy.

Your petitioner further represents that the said defendant in error, plaintiff in said action in the Circuit Court, demurred to the answer of your petitioner and to each of the separate defenses therein contained for the reason that the same do not state facts sufficient to constitute a defense to the cause of action in the complaint pleaded, and the demurrer was sustained to the whole of your petitioner's answer, and separately to each of the defenses therein contained, to which ruling of the Court

your petitioner at the time excepted. And your petitioner, electing to stand upon its answer in said Circuit Court, upon motion of the defendant in error and against the exception of your petitioner, said Court entered its judgment in favor of defendant in error and against your petitioner for Seven Thousand Four Hundred and Forty-eight and 94/100 Dollars, with interest and costs. That your petitioner feeling aggrieved by the judgment of said Circuit Court, sued out a writ of error in the Circuit Court of Appeals for the Ninth Circuit for the correction of the manifest errors that had happened, to the damage of your petitioner, as shown by the records and proceedings, as well as the judgment in said cause, and the returned writ of error having been made to the said Circuit Court of Appeals, the cause came on for hearing before said Court, and on the 9th day of October, 1899, said Circuit Court of Appeals rendered its judgment in writing, affirming the judgment of the said Circuit Court.

IV.

Pursuant to its written opinion, said Circuit Court of Appeals has entered its judgment affirming the judgment of the Circuit Court.

V.

Your petitioner states that on the face of the record of said cause as the same is on file and was presented in said Circuit Court of Appeals, with the assignment of errors made and presented by your petitioner in said Circuit Court of Appeals, the following questions and propositions were and are in issue in the adjudication of said cause.

FIRST.

Whether the statutes of New York of 1877, 1892 and 1897 respectively apply at all to the State of Washington or in any event to this case where the policy was delivered and the first premium paid in the State of Washington.

SECOND.

Whether if the policy was delivered in the State of Washington and there became a binding contract, it was lawful for the parties to provide in it for a waiver of notice of the due date of premiums.

THIRD.

Whether the New York statutes are merely ones of regulation, effective only within the State of New York, or whether they were when in force respectively a part of the charter of your petitioner, and limited its powers of contracting outside the State of New York, and whether it was competent for the parties in an agreement subsequent to the delivery of the policy to enter into another agreement by which they dispensed with the notice prescribed by the New York statutes if the same applied.

FOURTH.

Whether confessed knowledge of the amount of premiums and the date of their payment, and an express refusal on the part of the insured to make payment obviates the necessity of statutory notice, if the same is required.

FIFTH.

Whether the statutes of New York of 1877, 1892 and 1897 respectively, being of a general nature, apply to your petitioner, a corporation created and chartered under a special act of the Legislature of that State.

SIXTH.

Whether the policy of the State of Washington according freedom of contract should be a controlling reason for holding this policy a Washington instead of a New York contract.

SEVENTH.

Whether the failure to give notice of a particular premium maturing under the acts of 1877, 1892 and 1897 respectively will have the effect of keeping the policy alive, notwithstanding all subsequent premiums have been knowingly left upaid by the insured.

EIGHTH.

Whether even if the statute of 1877 applied at all it did not apply only to the premium due May 18th, 1892, which was paid, and whether the statute of 1892 if it applied at all did not apply only to the premium due dates respectively May 18th, 1893, May 18th, 1894, May 18th, 1895, and May 18th, 1896, and whether the statute of 1897 if this series of statutes applied at all, did not apply to the premium due May 18th, 1897, and whether if the

statute of 1897 applied to the premium due May 18th, 1897, there was no obligation to send any notice, because Sears was not a resident of the State of New York.

NINTH.

Whether, although your petitioner failed to give the notice under the Acts of 1877, 1892 and 1897 respectively (if required), and all subsequent premiums due prior to the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property, without consideration, to require your petitioner in case of the death of the insured to pay the policy.

TENTH.

In event it should be held the statutes of New York of 1877, 1892 and 1897 respectively, apply to this case, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

ELEVENTH.

Whether, in this action, pleading only the policy of insurance, and a performance by the insured of its conditions and without pleading the statutes of New York of 1877, 1892 and 1897 respectively, a recovery can be had when plaintiff admits non-payment of all premiums subsequent to the first up to the death of the insured.

TWELFTH.

Whether it is not a fatal departure from law to law for a plaintiff, alleging as his cause of action a policy of insurance and compliance with its terms, and admitting the defense of non-payment of premiums, to recover judgment because defendant has failed to show compliance with the statutes of New York of 1877, 1892 and 1897 respectively (if the same apply) in regard to mailing notice of the due date of premium, notwithstanding said statutes have not been pleaded by either plaintiff or defendant in the case.

THIRTEENTH.

Whether, in this action, the statute of April, 1897 (which declares "no action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof, for which it is claimed that the forfeiture ensued"), precludes a recovery in this case, the action having been commenced on the 28th day of September, 1898, more than one year from May 18, 1897, the last pension due date before death.

FOURTEENTH.

Whether under the charter of the defendant Company and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the Company.

VI.

Your petitioner states that it has issued and now outstanding in the different Territories and States of the Union, many of life insurance policies, and has entered into such contracts with large numbers of the residents and citizens of the State of Washington, and other life insurance corporations, created and organized under the laws of the State of New York, have entered into and now have outstanding large numbers of similar policies in such States and Territories. That at the time of rendering its opinion in this case the Honorable Circuit Court of Appeals rendered similar opinions and upon substantially the same questions in three other cases wherein your petitioner is plaintiff in error and that another case in which your petitioner is plaintiff in error has been submitted to the said Circuit Court of Appeals involving the same questions, and a number of similar cases are now pending for decision in the United States Circuit Court for the District of Washington. That in view of the large amount of money involved in said cases. and in view of the difference in judicial opinions respecting a number of the questions involved in the cases, your petitioner represents that the gravity of the matters in this case is such that they should be authoritatively and finally adjudicated by this Honorable Court, upon a full and fair presentation of the merits of the case (or so much of them as the Court may direct) on the part of your petitioner and the said defendant in error Bessie F. Sears.

That the Phinney case (No. 12 on the calendar of this Court) involves many of the above questions.

VII.

Your petitioner states that a certified copy of the entire record in said case in the said Circuit Court of Appeals is

herewith furnished and hereto annexed as a part of this application, in conformity to Rule 37 of this Honorable Court relating to cases in the Circuit Court of Appeals, and the same is marked "Exhibit A."

WHEREFORE, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, certifying the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in said cause therein entitled "The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *vs.* Bessie F. Sears, as executrix of the last will and testament of Stephen P. Sears, deceased, defendant in error, No. 541," to the end that the said cause may be reviewed and determined by this Court as provided by Section 6 of an Act of Congress, entitled: "An Act to Establish Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and for Other Purposes," approved March 3d, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity to said act, and that the said judgment of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
ROBERT C. STRUDWICK,
Attorneys and Counsel for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, } ss.
COUNTY OF NEW YORK. }

EDWARD LYMAN SHORT, being duly sworn, says: That he is one of the attorneys and of counsel for The Mutual Life Insurance Company of New York, the Petitioner above named, and as such has had personal charge for it of the case in the foregoing petition named in the Circuit Court of Appeals for the Ninth Circuit. That he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

EDWARD LYMAN SHORT.

Subscribed and sworn to before me, this 16th day of November, A. D., 1899.

ALFRED MACKAY,
[SEAL.] Notary Public,
New York Co.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 453.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

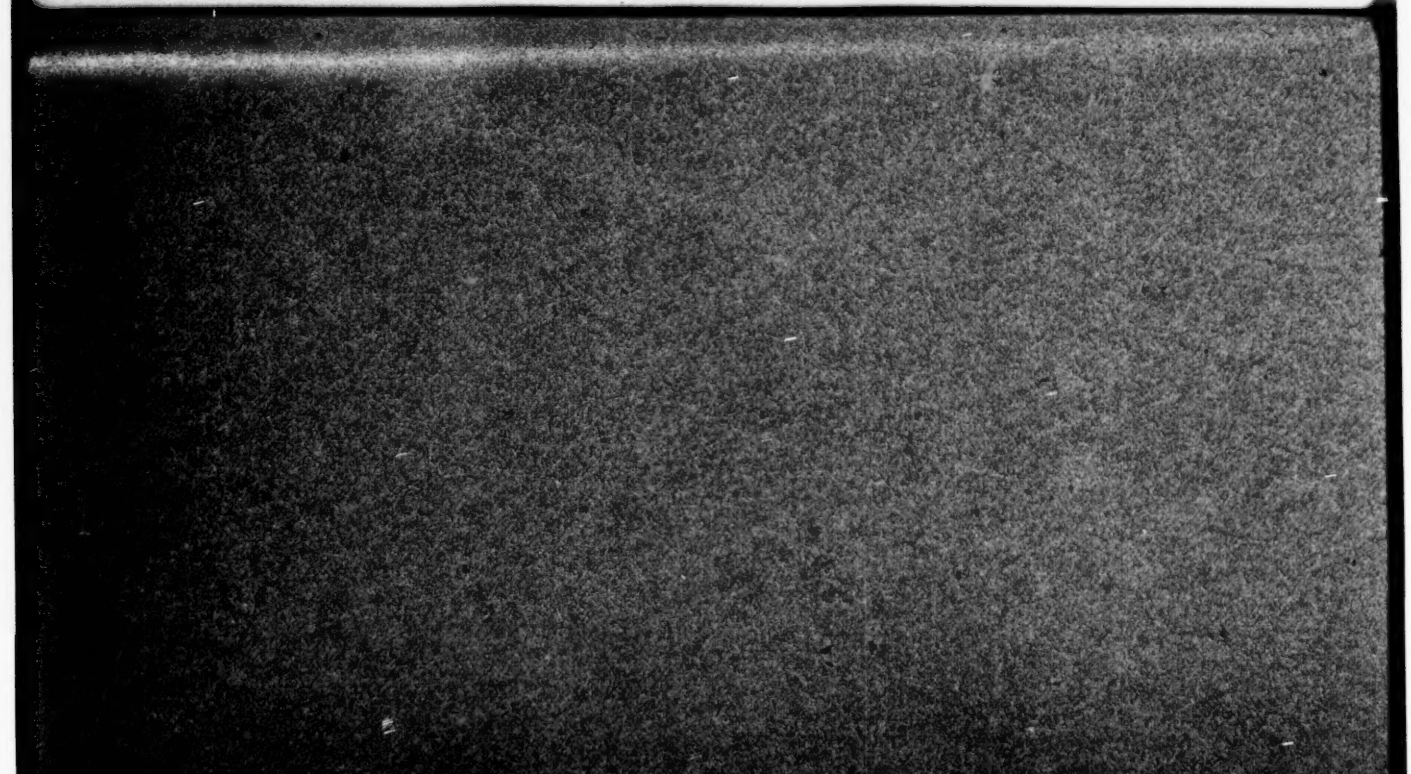
vs.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, BY THEIR GUARDIAN, EBEN SMITH, AND ELIZA MAUDE HILL, IN HER OWN BEHALF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1899.
CERTIORARI AND RETURN FILED MAR 10 1900

(17,567.)



17012

(17,567.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 453.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, BY THEIR GUARDIAN, EBEN SMITH, AND ELIZA MAUDE HILL, IN HER OWN BEHALF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Judd & Detweiler, Printers, Washington, D. C., February 17, 1900.

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1 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,
vs.
GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Defendants in Error.
} No. —.

Order Enlarging Time to File Clerk's Return and Docket Cause.

Now, on this fifteenth day of February, 1899, upon the application of Messrs. Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error above named, and good and sufficient cause being shown and appearing therefor, it is ordered by the court that the time within which the clerk of the circuit court of the United States for the district of Washington shall make, transmit to, and file with the clerk of the United States circuit court of appeals for the ninth circuit, his return of the writ of error and copy of the record in the above entitled cause be, and the same is hereby, extended thirty days from the return day of said writ of error and the citation herein, to wit, thirty days from the twenty-first day of February, 1899, and that the time within which said plaintiff in error
2 shall docket said cause and file the record thereof with the clerk of said circuit court of appeals be and the same is hereby extended for the time above named.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States, and the Judge Who Allowed said Writ of Error and Signed said Citation.

(Endorsed:) Original. No. 518. In the United States circuit court of appeals for the ninth circuit. The Mutual Life Insurance Co. of New York, plaintiff in error, *vs.* George E. Hill *et al.*, defendants in error. Order enlarging time to file clerk's return and docket cause. Filed February 20, 1899. F. D. Monckton, clerk. Struve, Allen, Hughes & McMicken, for plaintiff in error, 520 Bailey building, Seattle, Wash.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
} No. 511.

3 *Amended Complaint.*

Come now the above-named plaintiffs, by their attorneys, and for a cause of action against the above-named defendant complain and allege:

First.

That the above-named plaintiffs, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill are each of them under the age of twenty-one years.

Second.

That on the seventh day of April, 1888, at Seattle, Territory of Washington, now State of Washington, the above-named Eben Smith was duly appointed by the district court of the then Territory of Washington, now State of Washington, district guardian of the property and person of George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, and thereupon said Eben Smith qualified as such guardian, and he has ever since been, and now is, the duly appointed, qualified, and acting guardian of the property and persons of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill.

Third.

That said George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, Eliza Maude Hill, and Eben Smith are each and all of them, and during all the times herein have been, residents, citizens and inhabitants of the State of Washington.

Fourth.

4 That the defendant, The Mutual Life Insurance Company is a corporation duly organized, acting and existing *and* under and by virtue of the laws of the State of New York, with its principal office and place of business in the city of New York, State of New York.

Fifth.

That on or about the twenty-ninth day of April, 1886, said defendant, in consideration of the sum of eight hundred and fourteen dollars ($814) to it in hand paid by one George Dana Hill, made, executed and delivered in the city of New York, State of New York, a certain contract or policy of insurance hereinafter set forth,

whereby it insured the life of said George Dana Hill in the sum of twenty thousand dollars ($20,000). That said defendant in said contract agreed to pay Ellen Kellogg Hill, if living, and if not living then to such of the children of their bodies (the bodies of said George D. and Ellen Kellogg Hill) as shall be living at the death of said Ellen Kellogg Hill, or their guardian for their use, upon acceptance of satisfactory proof, of the death of said George Dana Hill, the full sum of twenty thousand dollars ($20,000). That said contract or policy of insurance is in words and figures as follows, to wit:

No. 281,470. A.

The Mutual Life Insurance Company of New York.

Age, 46 years. Amount, $20,000.

In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill of Seattle, in the county of King, Washington Territory, for her sole
5 use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife or to their guardian, for their use, twenty thousand dollars ($20,000) upon acceptance of satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy which are hereby referred to and made part hereof.

The annual premium of eight hundred and fourteen dollars ($814.00) shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

In witness whereof the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York the twenty-ninth day of April, A. D. one thousand eight hundred and eighty-six.

RICHARD A. McCURDY, *President.*
W. J. EASTON, *Secretary.*

Provisions, Requirements, and Benefits.

Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the
6 company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of

this contract shall be deducted from the amount of the claim. If this policy shall become void for non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided.

Dividends.—This policy is issued on the five-year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of each five years from the date of issue. Only policies in force at the end of such terms, and entitled thereto by year of issue, shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any other time. All surplus so apportioned may be applied at the end of such periods to purchase additional insurance, or in payment of future premiums on this policy, if requested in writing, or may then be drawn in cash.

Paid-up policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a paid-up policy, payable as herein provided, for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

7 Surrender.—This policy may be surrendered to the company at the end of the fifth year from the date of issue, and eighty per cent. of the reserve computed by the American table of mortality and four and one-half per cent. interest, and the surplus as defined above, will be paid therefor. If surrendered at the end of the second, or of any subsequent five-year period, the full reserve by the same standard and the surplus as defined will be paid. No cash value will be paid for a surrender at any other time or date.

Notice.—Powers of agents.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignment of this policy until the original or a duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

That the first annual premium of eight hundred and fourteen dollars ($814) was paid to said defendant company on the delivery thereof to said George Dana Hill, by said George Dana Hill.

Sixth.

That the application referred to is not in the hands of plaintiffs, but is in the hands and possession of defendant and plaintiffs cannot set forth a copy thereof, but plaintiffs allege that said

8 application contained the following agreement and words:

"And it is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company

and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and that if said policy be issued the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York."

Seventh.

Said Ellen Kellogg Hill mentioned in said contract above set forth, died February 14, 1887, in the city of Seattle, Territory of Washington, now State of Washington. Said Ellen Kellogg Hill died prior to said George Dana Hill.

Eighth.

Said George Dana Hill, insured, died on the fourth day of December, 1890.

Ninth.

Said Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill were children of the bodies of said Ellen Kellogg Hill and George Dana Hill, and were living at the time of the death of said Ellen Kellogg Hill.

Tenth.

Said Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill were the only children of the bodies of said Ellen Kellogg Hill and George Dana Hill at the time of the death of said Ellen Kellogg Hill.

9 Eleventh.

That on the twenty-third day of December, 1890, the defendant was notified of the death of said George Dana Hill, and requested to furnish plaintiffs necessary blanks in order that plaintiffs might furnish proofs of death as required by the rules and regulations of defendant company.

Twelfth.

That on the third day of February, 1891, said defendant in reply thereto informed and declared to said plaintiffs that said contract or policy of insurance above set forth had been forfeited by the nonpayment of a premium.

That said defendant thereby waived the right to claim any other or any proofs of the death of said George Dana Hill.

Thirteenth.

That said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed.

Fourteenth.

That the defendant has wholly failed to pay to plaintiffs said policy of insurance or said sum of twenty thousand dollars ($20,000), or any part thereof.

Wherefore plaintiffs pray for judgment against said defendant in the sum of twenty thousand dollars ($20,000), with interest thereon at the rate of six per cent. per annum, from the third day of January, 1891, together with cost- and disbursements in this action.

SMITH & LITTELL,
STANTON WARBURTON,
Attorneys for Plaintiffs.

10 STATE OF WASHINGTON, } ss:
County of King, }

Eben Smith, being first duly sworn on oath, deposes and says: that he is the Eben Smith above named as one of the plaintiffs in the above entitled action; that he has read the foregoing complaint, and knows the contents thereof, and that he believes the same to be true.

EBEN SMITH.

Subscribed and sworn to before me this nineteenth day of October, 1895.

[SEAL.] THOMAS T. LITTELL,
Notary Public, Residing at Seattle, King County, State of Washington.

(Endorsed:) Amended complaint. Filed Oct. 19, 1895, in the United States circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

United States Circuit Court for the District of Washington.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 511.

11 *Præcipe for Appearance of Attorneys for Plaintiffs.*

To the clerk of above-entitled court:

You will please enter our appearance as attorneys for above-named plaintiffs in the above-entitled cause.

Dated Oct. 19, 1895.

SMITH & LITTELL,
STANTON WARBURTON,
Attorneys for Plaintiffs.

(Endorsed:) Præcipe for appearance. Filed Oct. 19, 1895. A. Reeves Ayres, clerk. R. M. Hopkins, deputy clerk.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. } No. 511.

Præcipe for Appearance of Attorneys for Defendant.

To the clerk of the above-entitled court:

Please enter our appearance for the Mutual Life Insurance Company of New York, specially for the purpose of objecting to the jurisdiction and power in said court to compel said corporation, The Mutual Life Insurance Company of New York, named as defendant herein, to appear or answer in the above cause; and of objecting to the return of the marshal upon the summons issued in said cause, and for no other purpose. At the same time we file this præcipe, we file a motion to set aside and quash said return, and to dismiss the said action for want of jurisdiction in this court.

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STRUDWICK & PETERS,
Attorneys for the Mutual Life Insurance Company of New York.

(Endorsed:) Appearance præcipe. Filed Nov. 13, 1895, in the United States circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 511.

Stipulation.

It is stipulated between the plaintiffs and defendant, the consent of the court being given thereto, that the said plaintiffs may amend their complaint and make such amendment by the substitution of the following matter, in lieu of the first page of said complaint as the same is now upon file, and that as so amended, such amended complaint stands as the amended complaint of plaintiffs in this cause. That the said defendant make answer to the same instanter, and that plaintiffs immediately demur to the answer to said amended complaint, and that the court may rule upon said

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demurrer upon the arguments heretofore made, without further argument on the part of the plaintiffs or defendant, and that said amended complaint, defendant's answer thereto, and plaintiffs' demurrer to said answer, constitute and are the pleadings in this cause.

Dated this eighteenth day of January, 1899.

S. WARBURTON, *Attorney for Plaintiffs.*
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
} No. 511.

14 *Amended Complaint.*

Come now the above-named plaintiffs, by their attorneys, and for a cause of action against the above-named defendant, complain and allege:

First.

That the above-named plaintiffs, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill are each of them under the age of twenty-one years.

Second.

That on the seventh day of April, 1888, at Seattle, Territory of Washington, now State of Washington, the above-named Eben Smith was duly appointed by the district court of the then Territory of Washington, now State of Washington, district guardian of the property and person of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, and thereupon said Eben Smith qualified as such guardian, and he has ever since been and now is the duly appointed, qualified and acting guardian of the property and persons of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill.

Third.

That said George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, Eliza Maude Hill and Eben Smith are each and all of them, and——

(Endorsed:) Stipulation and amended complaint. Filed Jan. 18, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

15 In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
No. 511.

Answer to Amended Complaint.

Comes now the above-named defendant and makes answer to the amended complaint of said plaintiffs, this day filed pursuant to the stipulation of the parties, and the direction and order of this court, as follows:

I.

Said defendant, The Mutual Life Insurance Company of New York, a corporation, denies so much of paragraph V of said amended complaint as alleges that this defendant made, or executed, or delivered in the city of New York, State of New York, or at any place outside the State of Washington, the contract or policy of insurance set forth in said complaint. It further denies that the consideration of the said contract of insurance was other than is stated in said contract.

16 II.

It admits that said George Dana Hill mentioned in said complaint died on the fourth day of December, A. D. 1890, but it denies that the said George Dana Hill was at the time of his death insured in said defendant company, as alleged in paragraph VIII of said amended complaint, or at all; or that the said George Dana Hill had been insured in said defendant company at any time subsequent to the twenty-ninth day of April, 1887.

III.

It denies each and every allegation contained in paragraph XIII of said amended complaint.

For a first affirmative defense, the said defendant alleges:

I.

That the defendant is, and was at all times mentioned in the complaint, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, and is and was at all of the said times engaged in transacting a life-insurance business in the Territory, now State, of Washington, under and by virtue of and in pursuance of the laws of said Territory, now State, of Washington, having its principal office for the transaction of business in

said State and Territory at the city of Seattle, Territory, now State, of Washington.

II.

That on or about the twenty-eighth day of April, A. D. 1886, one George Dana Hill, being the same George Dana Hill named
17 in the said complaint, and who was at all times herein mentioned a citizen and resident of the Territory, now State, of Washington, made, signed and delivered to the defendant at its office in Seattle aforesaid, his written application to defendant for a policy of insurance upon his life in the sum of twenty thousand ($20,000) dollars, which application became and was pursuant to its own terms and to the terms of the policy of insurance hereinafter mentioned a part of said policy, and of the *the* contract of insurance evidenced thereby.

III.

That the said application contained among other things, a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application."

IV.

That thereupon, the agent of defendant in Seattle aforesaid transmitted said application of the said George Dana Hill to the agent of the defendant in San Francisco, California, by whom the said application was transmitted to defendant in the city and State of New York.

V.

That thereafter, to wit, on the twenty-ninth day of April, 1886, the defendant, pursuant to said application, transmitted the policy of insurance referred to in said complaint, to its agent in San Francisco aforesaid, and thereafter, to wit, on the tenth day
18 of May, 1886, the agent of the defendant at San Francisco aforesaid transmitted the said policy of insurance to the agent of the defendant in Seattle aforesaid for delivery of the same to the said George Dana Hill, provided the said George Dana Hill should pay to the defendant in Seattle aforesaid, the premium due upon said policy, and said last-named agent of defendant in Seattle aforesaid, on or about the fifteenth day of May, 1886, delivered the said policy to the said George Dana Hill, and the said George Dana Hill then and there paid to the defendant the first premium due upon the said policy.

VI.

That it was provided in said policy of insurance mentioned in the said complaint, as a condition thereof, as follows: "The annual premium of eight hundred and fourteen dollars shall be paid in advance on the delivery of this policy, and thereafter to

the company, at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract."

And it was therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived.
19 That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void for non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided."

VII.

That pursuant to the conditions of the said policy, there became and was due to the defendant as a premium upon said policy of insurance on the twenty-ninth day of April, A. D. 1887, the sum of eight hundred and fourteen ($814) dollars, and the said George Dana Hill, and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs herein, failed, neglected and refused to pay to the defendant, at the time aforesaid, the said sum of eight hundred and fourteen ($814) dollars, or any part thereof, and ever since that time and up to the time of the death of the said George Dana Hill on the fourth day of December, 1890, the said George Dana Hill and the said Ellen Kellogg Hill, his wife, during her lifetime, and each and all of the plaintiffs, neglected and refused to pay to defendant the said sum or any part thereof, or any other sum or other thing of value whatever, by reason whereof the said policy of insurance became and was on the twenty-ninth day of April, A. D. 1887, according to the conditions aforesaid, void and of no effect.

And for a second affirmative defense the defendant alleges:

20 I.

That at a time more than one year from the time of the issuance of the policy mentioned in the complaint, and during the lifetime of the said George Dana Hill mentioned in the complaint, it was mutually agreed between the defendant and the said George Dana Hill, that the said contract of insurance should be waived, abandoned and rescinded, and the said George Dana Hill and the defendant then by mutual consent waived, abandoned and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder.

And for a third affirmative defense herein this defendant alleges:

I.

That the defendant is, and at all the times mentioned in the complaint was, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, and is, and was at all of said times, engaged in the transaction of a life-insurance business in the Territory, now State, of Washington under and by virtue, and in pursuance of the laws of the said Territory, now State, of Washington, having its principal office for the transaction of business in said State and Territory at the city of Seattle therein.

II.

That on the twenty-ninth day of April, 1886, defendant, pursuant to the application of said George Dana Hill therefor, he then and there being a resident of Seattle in said Territory, duly executed and delivered to said George Dana Hill its policy of insur-
21 ance in the sum of twenty thousand ($20,000) dollars (being the same policy in the complaint described) upon the payment by said George Dana Hill, to wit, at said city of Seattle, of the first annual premium on said policy in the sum of eight hundred and fourteen ($814) dollars and the said contract was thus entered into in the said city and in the Territory of Washington and took effect there.

III.

That the said policy among its other provisions contained the following: "Each premium is due and payable at the home office of the said company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary," and it was, upon the execution and delivery of said policy to said George Dana Hill, mutually agreed between the said defendant and the said George Dana Hill that all annual premiums subsequent to that paid at the time of the delivery of said policy should be by the said Hill paid to the defendant at the said city of Seattle, and the defendant's receipt therefor should be at the time of such payment delivered to said Hill at said city of Seattle.

IV.

This defendant alleges that the said plaintiffs, and each of them, should be and are estopped from and should not be permitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise given to said George Dana Hill a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time,
with the place where the same should be paid, the person to
22 whom the same is payable, and stating that unless the premium then due should be paid to the company, or its agents, within thirty days after the mailing of such notice, the policy, and all payments made thereon, should become forfeited, or any other notice prescribed by any statute or statutes of the State of New York

or any other notice than that hereinafter in this paragraph mentioned, for that, shortly prior to and after and on said twenty-ninth day of April, 1887, this defendant in writing, and also personally, notified and informed the said George Dana Hill, at said city of Seattle, that the premium of eight hundred and fourteen dollars, necessary to be paid on said policy for the continuance of said policy of insurance, was due and payable, and said defendant duly demanded payment of said premium in said sum, and at the same time and place tendered the receipt of the defendant therefor, duly signed by its president and secretary; and the said Hill being fully so informed and advised in the premises refused to make payment of said premium, or any part thereof, and then and there intending and for the purpose of inducing defendant to rely upon the same, informed defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but on the contrary he, the said George Dana Hill, intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or of any future premium accruing on said policy; and the said defendant, then and there and ever since
23 relying upon the said representations and conduct on the part of the said George Dana Hill was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and in good faith relying upon said conduct and representations on the part of said George Dana Hill, this defendant was induced to and did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon.

Wherefore, the said defendant asks judgment that it be dismissed with its costs.

STRUVE, ALLEN, HUGHES & McMICKEN,
STRUDWICK & PETERS, *Solicitors for Defendant.*

STATE OF WASHINGTON, } ss:
County of King, }

Sherwood Gillespy, being first duly sworn, on oath, deposes and says: That he is the general agent for the State of Washington of the defendant in the above-entitled action, authorized by it to solicit insurance in said State, and that he makes this affidavit in verification of the foregoing answer on behalf of said defendant. That he has read said answer, knows the contents thereof and believes the same to be true.

SHERWOOD GILLESPY.

24 Subscribed and sworn to before me this eighteenth day of January, 1899.

H. J. RAMSEY,
Notary Public in and for the State of Washington,
[NOTARIAL SEAL.] *Residing at Seattle.*

Copy of within amended answer received and due service of same acknowledged this eighteenth day of January, 1899.

S. WARBURTON,
Attorney for Plaintiffs.

(Endorsed:) Answer. Filed Jan. 18, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL ET AL., Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 511.

Demurrer.

Come now the plaintiffs, by their attorneys, and demur to the amended answer of the defendant as follows:

25 I.

Plaintiffs demur to the allegations contained in the first affirmative defense of defendant on the ground that the said first affirmative defense does not state facts sufficient to constitute a defense to plaintiffs' amended complaint.

II.

Plaintiffs demur to the allegations contained in defendant's second affirmative defense on the ground that the said second affirmative defense does not state facts sufficient to constitute a defense to plaintiffs' amended complaint.

III.

Plaintiffs demur to the allegations contained in defendant's third affirmative defense on the ground that the said third affirmative defense does not state facts sufficient to constitute a defense to plaintiffs' amended complaint.

S. WARBURTON,
Attorney for Plaintiffs.

STATE OF WASHINGTON, } ss:
County of King, }

S. Warburton, being of the counsel for plaintiffs in the above cause, believe- the foregoing demurrers are well founded in point of law.

S. WARBURTON.

Service admitted, at Seattle, Jan. 18, 1899.
STRUVE, ALLEN, HUGHES & McMICKEN AND STRUDWICK & PETERS, *Attorneys for Defendant.*

26 (Endorsed:) Demurrer to amended answer. Filed Jan. 18, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
No. 511.

Order Sustaining Demurrer and Judgment.

This cause coming on duly and regularly to be heard upon the plaintiffs' demurrer to the defendant's answer herein, and the court having heard argument of counsel thereon, and having considered the same, and being now fully advised in the premises,

It is ordered that said demurrer be and the same hereby is sustained; to which ruling of the court sustaining said demurrer defendant by its counsel in open court at the time duly excepts, and its exception is separately allowed by the court as to each of the grounds of demurrer.

Thereupon the defendant, by its counsel in open court, announces that it does not desire to amend its said answer, but elects to
27 stand thereon, and refuses to plead further; whereupon the plaintiffs, by their counsel, move the court for judgment in favor of the plaintiffs and against the defendant upon said demurrer; and the court being now fully advised upon the premises, grants said motion and orders judgment accordingly, to which action of the court in granting said motion for judgment and ordering judgment defendant at the time excepts, and its exception is allowed.

It is therefore considered, adjudged, and decreed that the plaintiffs George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben Smith, and Eliza Maud Hill in her own behalf, do have and recover of and from the defendant, The Mutual Life Insurance Company of New York, the sum of twenty-four thousand, eighty-six and sixty one-hundredths dollars, with interest thereon from date hereof, together with the costs of this action, taxed at twenty-four and eighty-four one-hundredths dollars, and that execution issue therefor. To which judgment and every part thereof defendant at the time excepts, and its exception is allowed.

Done in open court this eighteenth day of January, 1899.

C. H. HANFORD, *Judge.*

(Endorsed:) Order and judgment. Filed Jan. 18, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

28 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
vs.
GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Defendants in Error.

Assignment of Errors.

In the matter of the petition of The Mutual Life Insurance Company of New York, plaintiff in error.

Comes now the above-named plaintiff in error, The Mutual Life Insurance Company of New York, on this twenty-sixth day of January, 1899, by its attorneys, Edward Lyman Short, Struve, Allen, Hughes & McMicken and Strudwick & Peters, and says that in the record and proceedings in the above-entitled matter and cause there is manifest error, of which it makes the following assignment of errors:

I.

That the circuit court of the United States for the district of Washington, northern division, erred in sustaining the demurrer of the plaintiff and defendant in error to the first affirmative answer
29 and defense of defendant and plaintiff in error, The Mutual Life Insurance Company of New York, to the first cause of action in the amended complaint pleaded.

II.

The said circuit court erred in sustaining the demurrer of said defendant in error and plaintiff to the second affirmative defence of said defendant and plaintiff in error to the cause of action in the amended complaint pleaded.

III.

The said court erred in sustaining the demurrer of the said plaintiff and defendant in error to the third affirmative answer and defense of said defendant and plaintiff in error to the cause of action in said amended complaint set forth.

IV.

The said circuit court erred in sustaining the demurrer of said plaintiff and defendant in error to the answer of defendant and plaintiff in error.

V.

The said circuit court erred in granting judgment in favor of the said plaintiff and defendant in error against the said defendant and plaintiff in error for the amount of said judgment or any sum.

VI.

Because it is manifest upon the issues in said case that said plaintiff and defendant in error are not entitled to judgment.

30 VII.

That said circuit court erred in submitting said cause to trial upon the issues formed by the pleading.

Wherefore, the said plaintiff in error prays that the judgment of the said circuit court of the United States for the district of Washington, northern division, be reversed and that the said circuit court of the United States be ordered to enter an order reversing and setting aside said judgment and granting a new trial in said cause.

EDWARD LYMAN SHORT,
STRUVE, ALLEN, HUGHES & McMICKEN, AND
STRUDWICK & PETERS,
Attorneys for Plaintiff in Error and Defendant.

Copy of the foregoing assignment of errors received and service of same acknowledged this twenty-sixth day of January, 1899.

S. WARBURTON,
Attorney for Defendants in Error.

(Endorsed:) Assignment of errors. Filed Jan. 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

31 In the Circuit Court of the United States, District of Washington, Northern Division, Ninth Circuit.

George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs, *vs.* The Mutual Life Insurance Company of New York (a Corporation), Defendant.	No. 511.

Petition for Order Allowing Writ of Error.

The said defendant The Mutual Life Insurance Company of New York, a corporation, feeling itself aggrieved by the judgment entered in said cause on the eighteenth day of January, 1899, in favor of said plaintiffs and against said defendant for the sum of twenty-four thousand eighty-six and sixty one-hundredths dollars, with interest thereon from the date of said judgment at the rate of six per cent. per annum, together with said plaintiffs' costs, taxed at twenty-four dollars and eighty-four cents, and directing that execution issue therefor, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assign-
32 ment of errors which is filed herewith, comes now and prays said court for an order allowing the said defendant to prose-

cute a writ of error to the honorable United States circuit court of appeals for the ninth circuit for the correction of the errors complained of under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made, fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause be suspended and stayed until the determination of said writ of error by said circuit court of appeals for the ninth circuit. And further prays that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the circuit court of appeals, and your petitioner will ever pray.

Dated this twenty-sixth day of January, 1899.

EDWARD LYMAN SHORT,
STRUVE, ALLEN, HUGHES & McMICKEN, AND
STRUDWICK & PETERS,
Attorneys for the Defendant, The Mutual Life Insurance Company of New York, a Corporation.

Copy of the foregoing petition received and service of same acknowledged this twenty-sixth day of January, 1899.

S. WARBURTON,
Attorneys for Plaintiff.

(Endorsed:) Petition for order allowing writ of error. A. Reeves Ayres, clerk, by H. M. Walthew, deputy. Filed Jan. 26, 1899, in the United States circuit court.

33 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs, *vs.* THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	No. 511.

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the court-room of said court in the city of Seattle, Washington, upon the petition of the defendant, The Mutual Life Insurance Company of New York, a corporation, herein filed, praying the allowance of a writ of error to the United States circuit court of appeals for the ninth circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States circuit court of appeals for the ninth circuit, and that such other and further proceeding may be had as may be proper in the premises.

The court having duly considered the same, does hereby allow the said writ of error prayed for, and it is ordered that upon
34 the giving by said defendant The Mutual Life Insurance Company of New York, a corporation, of a bond according to law in the sum of twenty-eight thousand dollars, the same shall operate as a supersedeas bond and all proceedings be stayed pending the determination of said writ of error.

Dated this twenty-sixth day of January, 1899.

C. H. HANFORD, *Judge.*

Copy of the foregoing order received and service of same acknowledged this twenty-sixth day of January, 1899.

S. WARBURTON,
Attorney for Plaintiffs.

(Endorsed:) Order granting writ of error and fixing amount of bond. Filed January 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

35 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs, *vs.* THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	No. 511.

Supersedeas Bond.

Know all men by these presents, that we, The Mutual Life Insurance Company of New York, a corporation, the above-named defendant, as principal, and M. F. Backus and E. O. Graves of King county, Washington, as sureties, are held and firmly bound unto George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill in her own behalf, the above-named plaintiffs, in the sum of twenty-eight thousand dollars, to be paid to said plaintiffs, their executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-sixth day of January, 1899.

36 The condition of the above obligation is such that whereas, in the above court and cause, final judgment was rendered against the said defendant and in favor of said plaintiff in the sum of twenty-four thousand eighty-six and sixty one-hundredths dollars, with interest and costs; and

Whereas, the said defendant has obtained from said court a writ of error to reverse the judgment in said action, and a citation directed to the plaintiffs is about to be issued, citing and admonish-

ing them to be and appear in the United States circuit court of appeals for the ninth circuit, to be held at San Francisco, in the State of California:

Now, therefore, if the said defendant, The Mutual Life Insurance Company, a corporation, of New York, shall prosecute the said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation is to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK, [SEAL.]
By SHERWOOD GILLESPY,
Its General Agent for the State of Washington,
And by STRUVE, ALLEN, HUGHES & McMICKEN,
Its Attorneys.
M. F. BACKUS. [SEAL.]
E. O. GRAVES. [SEAL.]

[50c. revenue stamp affixed and cancelled.]

37 UNITED STATES OF AMERICA,
District of Washington, Northern Division, } ss:
King County,

M. F. Backus and E. O. Graves, sureties on the foregoing bond, being each duly sworn, each for himself deposes and says: That he is a freeholder in said district, and that he, the said M. F. Backus, is worth the sum of twenty-eight thousand dollars; and that he, the said E. O. Graves, is worth the sum of twenty-eight thousand dollars; and in each case exclusive of property exempt from execution, and over and above all debts and liabilities.

M. F. BACKUS.
E. O. GRAVES.

Subscribed and sworn to before me this twenty-sixth day of January, one thousand eight hundred and ninety-nine.

JAMES KIEFER,
[SEAL.] *United States Commissioner.*

[10c. revenue stamp affixed and canceled.]

The sufficiency of the sureties of the foregoing bond approved by me this twenty-sixth day of January, 1899.

C. H. HANFORD,
Judge of said Court.

Copy of foregoing bond received and service of same acknowledged this twenty-sixth day of January, 1899.

S. WARBURTON,
Attorney for Plaintiffs.

38 (Endorsed:) Supersedeas bond. Filed January 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

Writ of Error (Copy).

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, northern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court, before you, or some of you, between George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben Smith, and Eliza Maud Hill in her own behalf, plaintiffs, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if any judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-room of said court,
39 in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the twenty-first day of February, 1899, that the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeal- may cause further to be done therein to correct that error what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By H. M. WALTHEW, *Deputy.*

[Seal United States Circuit Court.]

The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

[Seal United States Circuit Court.]

Received this twenty-sixth day of January, 1899, a true copy of the foregoing writ of error, for defendants in error George E.
40 Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben Smith, and Eliza Maud Hill, in her own behalf.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington, Northern Division,
By H. M. WALTHEW, *Deputy.*

[Seal United States Circuit Court.]

(Endorsed:) Writ of error. Filed January 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

Citation (Copy).

UNITED STATES OF AMERICA, *ss:*

To George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill, in her own behalf, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, State of California, on the twenty-first day of February, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of the State of Washington, northern division, wherein The Mutual Life Insurance Company of New York, a corporation, is plaintiff in error and you are defendant- in error, to show
41 cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the twenty-sixth day of January, 1899.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

[Seal United States Circuit Court.]

Attest: A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By H. M. WALTHEW, *Deputy.*

We hereby, this twenty-sixth day of January, 1899, acknowledge service of the foregoing citation at Seattle, Washington.

S. WARBURTON,
Counsel for George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf.

(Endorsed:) Citation. Filed Jan. 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

42 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.

Præcipe for Record.

To the clerk of the above-named court:

In your return to the writ of error issued out of the circuit court of appeals for the ninth circuit to the above-named circuit court of the United States, you will please include the following:

(1.) Complaint (as amended by substitution of a page in accordance with stipulation filed January 18, 1899), filed October 19, 1895.

(2.) Præcipe for appearance of attorneys for plaintiffs, filed October 19, 1895.

(3.) Præcipe for appearance of attorneys for defendant, filed November 13, 1895.

(4.) Stipulation for amendment of complaint and relating to order of proceedings, filed January 18, 1899.

43 (5.) Answer to amended complaint, filed January 18, 1899.

(6.) Demurrer to answer, filed January 18, 1899.

(7.) Order and judgment, filed January 18, 1899.

(8.) Assignment of errors, filed January 26, 1899.

(9.) Petition for writ of error, filed January 26, 1899.

(10.) Order fixing amount of supersedeas bond, filed January 26, 1899.

(11.) Supersedeas bond, filed January 26, 1899.

(12.) Writ of error, filed January 26, 1899.

(13.) Copy of writ of error lodged with clerk for defendant in error, filed January 26, 1899.

(14.) Citation with acknowledgment of service, filed January 26, 1899.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

(Endorsed:) Præcipe for record. Filed in the United States circuit court Feb. 15, 1899. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

44 In the Circuit Court of the United States for the District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.
No. 511.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Washington*, } ss:

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify that the foregoing thirty-seven (37) typewritten pages numbered from one (1) to thirty-seven (37), both inclusive, constitute and are a complete, true, and correct copy of the record papers, and all proceedings had in the foregoing-entitled cause, as the same remains of record and on file in the office of said circuit court, and that the same, which I transmit, constitute my return to the annexed writ of error lodged and filed in my office on the twenty-fourth day of January, 1899.

45 I further certify that no opinion of the court was rendered or filed in said cause.

I further certify that I hereto annex and herewith transmit the original citation in said cause.

I further certify that the cost of preparing and certifying the foregoing transcript of record and return is the sum of $11.45, and that the same has been paid me in full by Struve, Allen, Hughes & McMicken, attorneys for the plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, this seventeenth day of February, A. D. 1899.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the District of Washington, Ninth Circuit,
[SEAL.] By R. M. HOPKINS,
Deputy Clerk.

[Canceled 10-ct. int. rev. stamp.]

Writ of Error (Original).

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, northern division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court
46 before you, or some of you, between George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben Smith, and Eliza Maude Hill in her own behalf, plaintiffs, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint; we being willing that such error, if any hath been, shall be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if any judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the twenty-first day of February, 1899.

That the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and
47 ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
[SEAL.] By H. M. WALTHEW, *Deputy.*

The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

[SEAL.]

Received this twenty-sixth day of January, 1899, a true copy of the foregoing writ of error, for defendants in error George E. Hill,

Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben S
and Eliza Maude Hill, in her own behalf.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Ninth
Circuit, District of Washington, Northern Divis
[SEAL.] By H. M. WALTHEW, *Deput*

(Endorsed:) Original. No. —. In the circuit court of ap
for the ninth circuit. The Mutual Life Insurance Company o
York, plaintiff in error, *vs.* George E. Hill *et al.*, defen
48 in error. Writ of error. Filed Jan. 26, 1899, in the U
States circuit court. A. Reeves Ayres, clerk, by H. M.
thew, deputy.

Citation (Original).

UNITED STATES OF AMERICA, *ss:*

To George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by
guardian, Eben Smith, and Eliza Maude Hill, in her own b
Greeting:

You are hereby cited and admonished to be and appear at a
of the United States circuit court of appeals for the ninth circ
be holden in the city of San Francisco, State of California, c
twenty-first day of February, 1899, pursuant to a writ of erro
in the clerk's office of the circuit court of the United States f
district of the State of Washington, northern division, wherei
Mutual Life Insurance Company of New York, a corporat
plaintiff in error, and you are defendant- in error, to show ca
any there be, why judgment in the said writ of error ment
should not be corrected and speedy justice should not be do
the parties in that behalf.

Dated the twenty-sixth day of January, 1899.

C. H. HANFORD,
United States District Judge for the District of Washing
Sitting as Judge of said Circuit Court of the United St
for the Ninth Circuit, District of Washington.
[SEAL.]

49 Attest: A. REEVES AYRES,
Clerk of said Circuit Court of the
United States for the Ninth Circuit,
District of Washing
By H. M. WALTHEW, *Deputy.*

We hereby, this twenty-sixth day of January, 1899, acknow
service of the foregoing citation at Seattle, Washington.

S. WARBURTON,
Counsel for George E. Hill, Ellen Kellogg Hill,
Eugene C. Hill, by Their Guardian, Eben Smith,
and Eliza Maude Hill, in Her Own Bel

(Endorsed:) Original. No. —. In the circuit court of appeals for the ninth circuit. The Mutual Life Insurance Company of New York, plaintiff in error, *vs.* George E. Hill *et al.*, defendant- in error. Citation. Filed Jan. 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

(Endorsed:) No. 518. United States circuit court of appeals for the ninth circuit. Mutual Life Insurance Company of New York (a corporation), plaintiff in error, *vs.* George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maude Hill, in her own behalf, defendants in error. In error to the circuit court of the United States for the district of Washington, northern division. Transcript of record. Filed Feb. 20, 1899. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

50 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation) *vs.* GEORGE E. HILL ET AL. } No. 518.

Order of Submission.

Ordered cause argued by John B. Allen and R. C. Strudwick, Esquires, counsel for the plaintiff in error, and Stanton Warburton, Esquire, counsel for the defendants in error, and submitted to the court for consideration and decision.

51 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error, *vs.* GEORGE E. HILL, EILEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Defendants in Error. } No. 518. 4543.

Opinion U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of Washington, northern division.

This action was brought by the children of George Dana Hill in their own name where of age, and by their guardian where under

age, to recover the amount of a policy of insurance upon the life of their deceased father.

The amended complaint alleged that on April 29, 1886, in consideration of the sum of $814 paid by George Dana Hill, the insurance company (plaintiff in error herein) made and delivered to him in the city of New York, a policy upon his life; the insurance to be paid to his wife, if living at his death, or in case of her death before that time to their children. This policy of insurance is set forth in the complaint, and reads as follows:

52 "In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill of Seattle, in the county of King, Washington Territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife or to their guardian, for their use, twenty thousand dollars ($20,000) upon acceptance of satisfactory proofs at its said office of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof.

The annual premium of eight hundred and fourteen dollars ($814) shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract." * * *

Upon the back of this policy are provisions to the effect that while the payments are due and payable at the home office they will be accepted elsewhere when made in exchange for the company's properly signed receipt; that notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and that any further notice required by any statute is expressly waived.

It is alleged in the complaint that the application for in-
53 surance contained the following agreement: "It is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application."

It is further alleged in the complaint, "that on the twenty-third day of December, 1890, the defendant was notified of the death of said George Dana Hill, and requested to furnish plaintiffs necessary blanks in order that plaintiffs might furnish proofs of death as required by the rules and regulations of defendant company; that on the third day of February, 1891, said defendant in reply thereto informed and declared to said plaintiffs that said contract or policy of insurance above set forth had been forfeited by the non-payment of a premium; that said defendant thereby waived the right to claim any other or any proofs of the death of said George Dana

Hill; that said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed; that the defendant has wholly failed to pay to plaintiffs said policy of insurance or said sum of twenty thousand dollars ($20,000) or any part thereof."

The answer to the amended complaint admits the issuance of the policy; but denies that it was delivered in the city of New York, or any place outside of the State of Washington; it denies all allegations of performance of the conditions of the contract on the part of the insured.

Three affirmative defenses are pleaded to the amended com-
54 plaint. The first alleges that the insurance company was transacting its business, at the time the policy was issued, in the State of Washington, having its principal office at Seattle in said State; that it had complied with the laws of the State relative to foreign corporations transacting business in it; that before the time of and subsequent to the taking out of the insurance George Dana Hill was a citizen and resident of the Territory and State of Washington; that at Seattle he made his application for the insurance; that this application was transmitted to the agent of the insurance company at San Francisco, and by him to the insurance company in the city of New York; that the insurance company, pursuant to the application, made the policy mentioned in the amended complaint, and sent it to the agent at San Francisco, who afterward transmitted it to the agent in Seattle, and that there the first premium was paid and the pol- delivered to the insured; that there became due on the policy April 29, 1887, a premium of $814, which has never been paid; that both the insured and the beneficiary refused to make payment of any part of it and from that time forth until the death of the insured nothing whatever has been paid on account of any of the premiums; that the policy became void upon such default and refusal.

The second affirmative defense alleged that at a time more than one year from the time of the issuance of the policy, mentioned in the complaint, and during the lifetime of the said George Dana Hill, it was mutually agreed between the defendant and the said George Dana Hill that the said contract of insurance should be waived, abandoned and rescinded, and the said George Dana Hill and the defendant then by mutual consent waived, aban-
55 doned and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder.

The third affirmative defense, after stating the provisions of the contract, alleged that the plaintiffs and each of them should be, and are, estopped from and should not be permitted to allege or prove that defendant did not mail or cause to be mailed, or otherwise give to said George Dana Hil- a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that unless the premium then due should be paid to the company, or its agents, within thirty days after the mailing of such notice, the policy and all payments made thereon

should become forfeited, or any other notice prescribed by any statute or statutes of the State of New York, or any other notice than that hereinafter mentioned; for that shortly prior to and after and on said twenty-ninth day of April, 1887, said defendant in writing and also personally notified and informed the said George Dana Hill, at said city of Seattle, that the premium of $814, necessary to be paid on said policy for the continuance of this policy of insurance was due and payable; that said defendant duly demanded payment of said premium in said sum, and at the same time and place tendered the receipt of the defendant therefor, duly signed by its president and secretary; that the said Hill, being fully so informed and advised in the premises, refused to make payment of this premium, or any part thereof, and then and there intending and for the purpose of inducing the defendant to rely upon the same, informed the defendant that he, the said George Dana
56 Hill, was unable to pay such premium and did not intend to make payment thereof, or of any premium thereafter to accrue on said policy of insurance, but, on the contrary, he intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or any future premium accruing on said policy; that the said defendant then and there and ever since relying upon the said representation and conduct on part of the said George Dana Hill, was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and that in good faith relying upon said conduct and representations, on the part of the said George Dana Hill, defendant was induced to and did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon.

A demurrer was interposed to each of these defenses on the ground that each of them failed to state facts sufficient to constitute a defense to plaintiffs' amended complaint.

Upon argument, each of these demurrers was sustained and exceptions taken by the defendant. The plaintiff in error elected to stand upon its pleadings, and declined to plead further. Thereupon the defendant in error moved the court for judgment, and the court granted the motion against the exceptions of the plaintiff in error, and rendered a judgment against the insurance company for $24,086.61, with interest from the date of the judgment, and costs.

57 The statute of New York regulating the forfeitures of life-insurance policies, as amended May 23, 1877, provides as follows:

"SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due

on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last-known post-office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing
58 of such notice. Provided, however, that a notice stating when the premium will fall due and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given."

Edward Lyman Short, John B. Allen, and R. C. Strudwick, for plaintiff in error.

Struve, Allen, Hughes & McMicken, and Strudwick & Peters, of counsel.

S. Warburton, for defendants in error; Eben Smith, of counsel.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, district judge (after stating the facts as above), delivered the opinion of the court:

This action was brought upon a policy of insurance issued by the plaintiff in error, April 29, 1886, insuring the life of George Dana Hill for twenty thousand dollars, upon which the first annual premium of $814 was paid when the policy was delivered. No other premiums were ever paid or tendered upon this policy; no notice was ever given by the insurance company to the insured, as
59 required by the laws of the State of New York, to the effect, among other things, that unless the said premium or interest due on said policy shall be paid, the company within thirty days

after the mailing of such notice, "the said policy and all payments thereon will become forfeited and void."

On December 4, 1890, George Dana Hill died. His surviving beneficiaries under the policy are defendants in error. Judgment was entered in their favor upon the pleadings on January 18, 1899, for $24,086.61, with interest and costs.

The policy of the insurance and all the circumstances in relation thereto and in connection therewith, and all the facts concerning the action of the court in sustaining the demurrer of the defendants in error and ordering judgment, are set forth in the statement of the case. There is no controversy as to the facts. The determination of the case rests solely upon the principles of law that are to be applied to the facts. These are important, and deserving of careful, painstaking, and deliberate consideration.

It is contended by the plaintiff in error, that the court erred in holding that the contract is to be governed by the statute of the State of New York. This question is not a new one in this court. It has been twice before presented, discussed, considered and decided.

Equitable Life *v.* Nixon, 81 Fed., 796;
Equitable Life *v.* Trimble, 83 Fed., 85.

After due deliberation upon the facts, and careful examination of the authorities, this court arrived at the conclusion that the contract there in question—which, in so far as the legal principles are involved, cannot be distinguished from the facts of this case—was a New York contract. Citing in support thereof

Wayman *v.* Southard, 10 Wheat., 48;
Pritchard *v.* Norton, 106 U. S., 124, 136, 141; 1 Sup. Ct., 102;
Bank *v.* Hume, 128 U. S., 195, 206; 9 Sup. Ct., 41;
Coghlan *v.* Railroad Co., 142 U. S., 101, 109; 12 Sup. Ct., 150;
Hall *v.* Cordell, 142 U. S., 116, 120; 12 Sup. Ct., 154.

In Equitable Life *v.* Nixon, as in this case, it was contended that the statement made by the insured when requested to pay the premium due upon the policy, that he did not intend to keep the policy in force, amounted in law to a waiver, on the part of both the insured and the company, of the notice required to be given by the statute of New York. Replying to this contention, the court said: "That the statute of New York prescribes the condition upon which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company, or the assured, or by both together.

Society *v.* Clements, 140 U. S., 226, 233; 11 Sup. Ct., 822;
Hicks *v.* Insurance Co., 9 C. C. A., 215; 60 Fed., 690;
Griffith *v.* Insurance Co. (Cal.), 36 Pac., 117;
Warner *v.* Association, 100 Mich., 157; 58 N. W., 667."

61 Entertaining no doubt of the correctness of the conclusions therein reached, we respectfully decline to further discuss the same identical questions. It is enough to say, that we adhere to the views therein expressed.

It is next contended by the plaintiff in error, that the judgment of the circuit court should be reversed because it is rendered, not upon the cause of action alleged in the amended complaint, but upon a cause of action entirely different in its scope, effect and meaning from the one alleged in the complaint; that, in point of fact, the right of the plaintiffs in the action to recover must be determined by the allegations of their complaint; that courts should not permit them to allege one ground of recovery in their complaint, and then afterward to rely upon another ground; that to permit such a course constitutes a departure not recognized by the law; that it is equally a departure where the plaintiffs bring an action relying upon the common or general law, and then attempt to recover by virtue of a statute; that the one is a departure from fact to fact, the other a departure from law to law. To quote from counsel's brief, "A party who pleads a specific contract, and performance on his part of its conditions as his right to recover, is not permitted, after performance has been controverted, to confess his non-compliance and shift his right of recovery to an unpleaded statute of a foreign State, and assert non-compliance with its provisions on the part of defendant, and adopt the defendant's non-compliance with the unpleaded statute as his own excuse for non-compliance with the conditions of the contract alleged in his complaint. The right of action alleged and abandoned is the act of the party; that
62 not alleged, but relied upon, is the act of the legislature of New York. With performance of the conditions alleged, the right of action is perfect, regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. If the statute of New York, instead of performance of the conditions of the contract by defendant in error, affords the ground of recovery, then pleading of the statute is indispensable."

In line with this contention it is also argued by the plaintiff in error, that the defendants in error were not entitled to judgment after the demurrer had been sustained to the affirmative answers and defenses, because issue was joined upon the allegations of performance of the conditions precedent on the part of the insured entitling defendants in error to a recovery.

Of course, the complaint should allege the actual performance of every condition precedent to the plaintiff's right of recovery. The rights of the parties must be determined upon the facts which are put in issue by the pleadings. There is always a departure when a party quits, or departs from, the case which he first made and has recourse to another, and the court is not justified in rendering judgment in favor of a plaintiff not warranted by the facts set forth in his pleadings.

The general principles of law contended for by counsel are undoubtedly correct. But, in so far as it is sought to apply them to

the case in hand, it becomes our duty to carefully consider the allegations of the complaint, and therefrom, in connection with the affirmative defense set up in the answer, determine whether or not the court erred in rendering judgment upon the pleadings.

63 In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this; that the plaintiff's right of recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance. The cause of action set out in the complaint was based upon the identical facts upon which the court gave judgment. There was, therefore, no departure in this case, either from fact to fact, or from law to law, and hence the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several States. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense.

In the second place, the complaint did not allege that the insured had, during his lifetime, complied with each and every covenant on his part to be performed. The allegation is: "That said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed." The natural effect and legal conclusion to be drawn from this averment is, that he had only done those things which he was required to do in order to keep the policy alive, of binding force and effect, and to show that it was an existing valid contract at the time of Hill's death, and that he had not during his lifetime done any act, or failed to perform any act, that forfeited his rights under said policy, or

64 which would in any manner deprive the beneficiaries of their rights thereunder. There is no allegation in the complaint that the insured paid any other than the first premium. The position taken by the defendants in error was that it was only necessary for them to show this fact in order to entitle them to recover. They never made any departure from this position. They never claimed that they had any right to recover upon any other ground. They recovered upon that ground alone. This was their first, last and only contention.

The affirmative matters alleged in the answer constituted no defense to the cause of action alleged in the complaint.

The contract of insurance became complete upon the payment of the first premium. It was kept alive by the provisions of the statute of New York, because the contingency of forfeiture, as therein provided for, had not happened. The contract is to be read in the light of the statute the same as if the statute had literally been incorporated in the policy. It was not essential to the right of recovery herein, that the defendants in error should have paid, or tendered payment, of the premiums due on the policy before com-

mencing the action. When Hill died the relation of debtor and creditors existed between the insurance company and the beneficiaries named in the policy. The unpaid premiums, with legal interest from the date they became payable, constituted a claim on behalf of the insurance company to be deducted when the company paid the amount due on the policy; thus leaving it in precisely the same situation in which it would have been if the premiums had been paid when they became due. The complaint stated a good
65 and complete cause of action. There could not be any forfeiture of the policy unless the insurance company in its answer alleged, and if a trial was had, proved non-payment of a premium due after regular service of the notice of non-payment, as required by the statute.

Carter *v.* Brooklyn Life Ins. Co., 110 N. Y., 16;
Phelan *v.* N. Y. M. L. Ins. Co., 113 N. Y., 147;
Baxter *v.* Brooklyn Life Ins. Co., 119 N. Y., 450;
De Freece *v.* N. L. Ins. Co., 135 N. Y., 144;
Griesemer *v.* Mutual Life Ins. Co., 10 Wash., 203;
Griffith *v.* Life Ins. Co., 101 Cal., 627, 642;
Osborne *v.* Home Life Ins. Co., 56 Pac. Rep., 616;
Hicks *v.* National Life Ins. Co., 60 Fed., 690, 692;
Mullen *v.* Mutual Life Ins. Co., 34 N. W., 605.

The plea of estoppel, as set forth in the third affirmative defense, is but another name for waiver. There is no question concerning the plea of estoppel that can be distinguished from the question as to the plea of waiver. As the parties could not waive the requirements of the statute, as to the manner in which the policy could be forfeited, how could the beneficiaries who had vested rights therein be divested of such rights, except in the manner provided by law? They certainly could not be bound by any declarations which their father may have made in his lifetime, to any agent or officer of the insurance company, as to his inability to pay the premium then due upon the policy; or that he did not intend to pay that, or any future premium; or that the insurance company might consider the policy forfeited without giving the notice speci-
66 fied in the statute. To so hold would entirely abrogate the provisions of the statute and of the policy.

As was said by the court in Baxter *v.* Brooklyn Life Insurance Company, "When the provisions of this statute are adopted in a contract of insurance, for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then the clause and these conditions should be so construed as to give to the assured the full benefit contemplated without altering any other provision of the policy, if this can be done without violating any rule of law."

The judgment of the circuit court is affirmed, with costs.

(Endorsed:) Opinion. Filed October 2, 1899. F. D. Monckton, clerk.

67 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,
v.
GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Defendants in Error. } No. 518.

Judgment U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of Washington, northern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, northern division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed Oct. 2, 1899. F. D. Monckton, clerk.

68 At a stated term, to wit, the October term, A. D. 1899, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the ninth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation)
v.
GEORGE E. HILL ET AL. } No. 518.

Order Staying Mandate.

Upon motion of Warren Gregory, Esquire, ordered mandate herein stayed until the further order of the court.

69 United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error, *v.* GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Defendants in Error.	No. 518.

Clerk's Certificate to Transcript, U. S. Circuit Court — Appeals.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing sixty-eight (68) pages, numbered from one (1) to sixty-eight (68) inclusive, to be a full, true and correct copy of the transcript of the record, the order of submission, the opinion, the judgment, and the order staying mandate in the above-entitled cause, as the originals thereof remain and appear of record in my office, and that the same together constitutes a copy of the entire record of the case in said United States circuit court of appeals for the ninth circuit.

70 Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this fourteenth day of October, A. D. 1899.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Oct. 14, '99. F. D. M.]

71 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error and George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill, in her own behalf, are defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of February, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 453, October term, 1899. The Mutual Life Ins. Co. of New York *vs.* George E. Hill *et al.* Writ of certiorari. Filed Feb. 15, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY, Petitioner and Plaintiff in Error,	
vs.	
GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf.	No. 518.

Stipulation as to Return of the Writ of Certiorari.

It is, this 16th day of February, A. D. 1900, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause, heretofore submitted to the Supreme Court of the United States with the petition for a writ of certiorari, may be filed in the said Supreme Court, and may be received and considered by that court as the

transcript of the record in said cause as though the same had b
returned by the clerk of the circuit court of appeals for the ni
circuit in obedience to the writ of certiorari granted February
1900.

STRUVE, ALLEN, HUGHES & McMICKEN, AN
STRUDWICK & PETERS.
Attorneys for Petitioner and Plaintiff in Erro
S. WARBURTON,
Attorney for Respondent and Defendant in Erro

(Endorsed:) Stipulation as to return to writ of certiorari. F
Feb. 20, 1900. F. D. Monckton, clerk U. S. circuit court of app
for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit

I, Frank D. Monckton, clerk of the United States circuit cou
appeals for the ninth circuit, do hereby certify the next preced
page to be a full, true, and correct copy of a stipulation ent
into between the respective counsel, filed in the cause entitled
Mutual Life Insurance Company of New York, a corporation, pl
tiff in error, *v.* George E. Hill *et al.*, defendants in error, No. 51
the original thereof remains of record in my office.

Attest my hand and the seal of
Seal United States Circuit Court of Appeals, Ninth Circuit.
United States circuit court of appeals
the ninth circuit, at San Francisco,
fornia, this 23d day of February, A
1900.

F. D. MONCKTON, *Cler*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M

United States Circuit Court of Appeals for the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Plaintiff in Error,
v.
GEORGE E. HILL ET AL., Defendants in Error.
No.

Return to Writ of Certiorari.

I, Frank D. Monckton, clerk of the United States circuit cou
appeals for the ninth circuit, in obedience to the foregoing wr
certiorari, issued out of the Supreme Court of the United States
addressed to the honorable judges of the United States circuit c
of appeals for the ninth circuit, commanding them to transm
the said Supreme Court the record and proceedings in the ab
entitled cause, do hereby attach to the said writ a certified cop
a stipulation entered into between the attorneys of record for

several parties in said cause on the 16th day of February, 1900, the original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

[Endorsed:] Case No. 17,567. Supreme Court U. S., October term, 1899. Term No., 453. The Mutual Life Ins. Co. of New York *vs.* George E. Hill *et al.* Writ of certiorari & return thereto. Office Supreme Court U. S. Filed Mar. 10, 1900. James H. McKenney, clerk.

NOV 20 1889
JAMES H. McKENNEY,
Clerk.

453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1889.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PLAINTIFF IN ERROR, vs. GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by their guardian, EBEN SMITH, and ELIZA MAUD HILL, in her own behalf, DEFENDANTS IN ERROR.

PETITION FOR WRIT OF CERTIORARI.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

The PETITION of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, respectfully shows to this Honorable Court as follows:

I.

That your petitioner is a mutual life insurance com-

pany, created and chartered under and by virtue of an act of the Legislature of the State of New York of April 12th, 1842, entitled, "An Act to incorporate The Mutual Life Insurance Company of New York," and a citizen of said State, with its principal office in the City of New York.

That in the year 1876, the Legislature of the State of New York, enacted a general statute entitled: "An act regulating the forfeiture of life insurance policies," (Laws 1876, Chap. 341) as follows:

AN ACT regulating the forfeiture of life insurance policies.

Passed May 15, 1876.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLWS:

SECTION 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last known post office address, not less than thirty nor more than sixty days next before such payments become due, according to the terms of such policy.

SEC. 2. The affidavit of any officer, clerk or agent of the company that the notice to the assured, provided for in Section 1, has been duly addressed and mailed by the company issuing such policy to the assured, shall be

presumptive evidence of such notice having been duly given.

SEC. 3. This act shall take effect immediately.

This statute was amended by the following general statute of 1877:

CHAP. 321.

AN ACT to amend chapter three hundred and forty-one of the laws of eighteen hundred and seventy-six, entitled, "AN ACT regulating the forfeiture of life insurance policies.

Passed May 23d, 1877.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. Section one of chapter three hundred and forty-one of the laws of eighteen hundred and seventy-six, entitled, "An Act regulating the forfeiture of life insurance policies, is hereby amended so as to read as follows:"

"SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable, shall be duly addressed and mailed to

the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty-days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding ; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

If this New York statute governed the policy *which we deny*, then the above act of 1877 governed the premiums due April, 1887, to December, 1889, the *second*, and subsequent premiums, none of which were paid. The death was on December 4, 1890.

That in an act of the Legislature of the State of Washington entitled "An act relating to foreign corporations and to repeal certain laws in connection therewith, ap-

proved March 28th, 1890, the following provisions are contained:

"SECTION 1. That any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and it is hereby authorized to sue and to be sued in any court having competent jurisdiction; to acquire, purchase, hold, mortgage, sell, convey or otherwise dispose of in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate by mortgage or otherwise due to, or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally to do and perform every act and transact every kind of business within this state, in the same manner and to the same extent as corporations incorporated and organized under the laws of this state, are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the second and third sections of this act."

That prior to the 29th day of April, 1886, your petitioner was transacting business in the territory, now state, of Washington, and in compliance with the requirements of such statute had filed and recorded in the office of the Secretary of said State, a duly certified copy of its charter, and had also constituted and appointed F. L. Stinson, residing at Seattle in said state, its agent, that being the place where the principal business of your petition was carried on in said state.

II.

Your petitioner states that prior to the 29th day of April, 1886, and until his death December 4th, 1890, one George Dana Hill resided at said City of Seattle, and was a citizen of the State of Washington.

That on the 28th day of April, 1886, the said George Dana Hill, at Seattle, made to your petitioner the usual application in writing for a policy of life insurance upon his life, in the sum of twenty thousand dollars That said application, after enumerating the usual statements and answers as to residence, occupation, place of business, nativity and other personal matters, contained the following paragraph:

"And it is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and that if said policy be issued, the declarations, agreements and warranties herein contained, shall be a part thereof; and the contract of insurance when made, shall be held and construed at all times and places to have been made in the City of New York."

That after signing such application said George Dana Hill at Seattle delivered it to the said F. L. Stinson, the petitioner's agent, who transmitted the same by mail to Andrew B. Forbes at San Francisco, California, the General Agent of your petitioner in the State of California, where the principal office of petitioner's company on the Pacific Coast was situated, and the said Forbes mailed the said application to your petitioner at New York City. Upon said application your petitioner executed its policy of life insurance to said George Dana Hill at New York City,

bearing date April 29th, 1886, and forwarded the same by mail to said Forbes, the General Agent at San Francisco, who mailed the same to said agent Stinson at Seattle, Washington, and said George Dana Hill at Seattle, shortly after that date, paid the first annual premium of Eight Hundred and Fourteen Dollars to said agent of your petitioner, and at the same time and place your petitioner, through its said agent delivered the policy to said George Dana Hill. The following, excepting the provisions of the contract not in any wise affecting this case, is substantially a copy of said policy of insurance:

"No. 281470 A.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Age 46 years. Amount $20,000.

In consideration of the application for this policy which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the City of New York, unto Ellen Kellogg Hill, wife of George Dana Hill of Seattle, in the County of King, Washington Territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife or to their guardian, for their use, twenty thousand dollars ($20,000) upon acceptance of satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made a part hereof.

The annual premium of eight hundred and fourteen dollars ($814.00) shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the City of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

In witness whereof the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the City of New York, the twenty-ninth day of April, A. D. one thousand eight hundred and eighty-six.

RICHARD A. McCURDY,
President.

W. J. EASTON,
Secretary.

" Provisions, Requirements and Benefits.

" Payment of Premiums.—Each premium is due and payable at the home office of the company in the City of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void for non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

That shortly before the 29th day of April, 1887,

when the second annual premium on the policy became due, petitioner placed renewal receipt in the hands of its agent F. L. Stinson, at Seattle, and authorized him to deliver the same to the insured upon payment of the premium, and both orally and in writing notified the said George Dana Hill of that fact, and also in the same manner notified him of the date when the *second annual* premium would fall due, namely, April 29th, 1887, and the amount thereof, Eight Hundred and Fourteen Dollars. That on the 29th day of April, 1887, the said agent presented the renewal receipt to said George Dana Hill at Seattle, and demanded payment of the premium then due, but the insured, with full personal knowledge of the amount of the premium and of its being due on said date, and of the offer of the renewal receipt upon such payment, refused to make payment, and after subsequent requests of payment by the agent and offer of such renewal receipt in exchange for the same, still made refusal and informed the petitioner that he was unable to pay the premium and did not intend to make payment of it, or of any premium thereafter to accrue on the policy, but on the contrary he intended the policy to become lapsed and forfeited for want of payment of the premium then due, or any future premium, and thereafter such receipt was returned to your petitioner's principal office at New York, and your petitioner caused the lapsing and forfeiture of such policy to be entered upon its books for default in the payment of said second annual premium. That payment has never been made or tendered the petitioner of said premium, or any part thereof, nor of any of the subsequent annual premiums falling due before the death of the insured, December 4th, 1890.

III.

Your petitioner further states that after the death of the insured at Seattle, December 4th, 1890, action was commenced by the defendants in error to recover Twenty Thousand Dollars, the amount of the policy, with interest, in the United States Circuit Court for the District of Washington, Northern Division, in their complaint setting forth the policy of insurance and alleging compliance with its terms on the part of the insured during his life-time. Your petitioner in said action admitted the execution of the policy, but denied the same was executed in the State of New York or elsewhere than in the State of Washington. controverted compliance on the part of the insured or the plaintiffs in said action with the terms and conditions of the policy, and alleged affirmatively that the said George Dana Hill had failed, neglected and refused to pay the premium due on said policy April 29th, 1887, or any part of it, or anything save the first annual premium paid at the time of delivery of the policy. Your petitioner also pleaded that subsequent to the delivery of said policy, by agreement between your petitioner and George Dana Hill, during his life-time, it was mutually agreed the contract of insurance should be and it was waived, abandoned and rescinded, and the parties waived and abandoned all their respective rights and obligations under the policy.

And your petitioner, for a further defense, averred that at the time of issuing the policy and prior and subsequent thereto, your petitioner was transacting its life insurance business in the territory, now state, of Washington, with its principal office and agent in the state at Seattle. That prior to the 20th day of April, 1886, said George Dana Hill, who was at that time a resident of Seattle, and a citi-

zen of the State of Washington, made application in writing to your petitioner for a policy of life insurance. That the application contained the following provision:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application."

That the agent of your petitioner at Seattle received the application, and caused the same to be mailed to the agent at San Francisco, by whom it was transmitted to your petitioner in the City of New York, and that on the 29th day of April, 1886, your petitioner transmitted the policy of insurance, through its said agents, to the City of Seattle, where on or about the 15th day of May, 1886, it was delivered to said George Dana Hill, who in exchange for it then and there paid to defendant the first annual premium of Eight Hundred and Fourteen Dollars.

In said defense it was alleged that the policy contained the following provision:

"The annual premium of Eight Hundred and Fourteen Dollars ($814.00) shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the City of New York, on the twenty-ninth day of April in every year during the continuance of this contract."

And it was further provided in said contract as follows:

"Each premium is due and payable at the home office of the company in the City of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the President and Secretary. Notice that each and every such payment is due at the

date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

It was further in said defense alleged that pursuant to the conditions of the policy there became due a premium on the 29th day of April, 1887, of Eight Hundred and Fourteen Dollars, and that the said George Dana Hill and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs in the action, failed, neglected and refused to pay the premium, or any part of it, and ever since have continued such neglect and refusal, and that by reason thereof the policy became forfeited on the 29th day of April, 1887, according to the said condition.

As an additional affirmative defense your petitioner pleaded the application for and the execution and delivery of the policy as in the preceding defense, and further alleged that the policy contained the following provision, namely:

"Each premium is due and payable at the home office of said company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary."

And that it was, upon the execution and delivery of said policy to the said George Dana Hill, mutually agreed between your petitioner and the said Hill that all annual payments, subsequent to that paid at the delivery of the policy, should be paid by said Hill to the defendant at the City of Seattle, and the defendant's receipt should in exchange for such payment be there delivered to said Hill; and that in pursuance of said policy and said agreement, shortly prior to and after and on said 29th day of April, 1887, your petitioner, in writing and also personally noti-

fied and informed the said George Dana Hill at said City of Seattle, that the premium of Eight Hundred and Fourteen Dollars, necessary to be paid on said policy for the continuance of the same, was due and payable on said 29th day of April, 1887, and on said date said defendant duly presented the receipt of your petitioner duly signed by its president and secretary, for the said premium falling due April 29th, 1887, and tendered the same to said George Dana Hill upon payment of the said premium, and that said Hill being fully informed and advised, refused to make such payment and receive said receipt therefor, and then and there informed your petitioner that he, the said George Dana Hill, was unable to pay said premium and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but on the contrary intended to allow the said policy to lapse and become forfeited for non-payment of the said premium, or any premium afterward accruing on such policy, and that your petitioner then and there and ever since relying upon said conduct and representations of said George Dana Hill was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and in good faith relying upon said conduct and representations on the part of the said George Dana Hill, your petitioner was induced to and did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise to the said George Dana Hill, or any person interested in said policy, concerning the payment of any premium thereon.

IV.

Your petitioner further represents that the plaintiffs in said action in said Circuit Court demurred to the answer

of your petitioner and to each of the separate defenses therein contained for the reason and upon the ground that the same do not state facts sufficient to constitute a defense to the cause of action in the complaint pleaded, and the demurrer was sustained to the whole of your petitioner's answer, and separately to each of the defenses therein pleaded, to which rulings of the Court your petitioner duly excepted. And your petitioner, electing to stand upon its answer in said Circuit Court, upon motion of the defendants in error against the exception of your petitioner, said court entered its judgment in favor of defendants in error and against your petitioner, in the sum of Twenty-four Thousand Eighty-six and 61-100 Dollars, with interest thereon from the date of such judgment, together with the costs of the action. That your petitioner, feeling aggrieved by the judgment of said Circuit Court, duly and within six months after the rendition of such judgment, applied to the Circuit Court of Appeals for the Ninth Circuit for a Writ of Error for the correction of the manifest errors that happened, to the damage of your petitioner, as shown by the records and procedings, as well as by the judgment in said cause; and a writ of error was duly issued out of said Circuit Court of Appeals. The return of such writ being duly made to said Circuit Court of Appeals, the same came on for hearing before said Court, and thereafter, and on the 2d day of October, 1899, the said Circuit Court of Appeals rendered its opinion in writing, affirming the judgment of the said Circuit Court.

V.

That pursuant to its written opinion, said Circuit Court of Appeals has entered its judgment affirming the judgment of the Circuit Court, and remanding the cause to said Court for the execution thereof.

VI.

Your petitioner states that upon the face of the record of said cause, as the same is on file and was presented in said Circuit Court of Appeals by the Assignment of Errors made and presented by your petitioner in said Circuit Court of Appeals, the following questions or propositions were and are in issue, and involved in the adjudication of said case:

FIRST.

Whether the contract of life insurance on which the action was brought is one entered into under and governed by the laws of the State of Washington or the laws of the State of New York, when the policy was delivered and the first premium paid in the State of Washington, and whether such statute of the State of New York of 1877, requiring notice to be given as therein prescribed, applies to the State of Washington at all.

SECOND.

Whether actual knowledge, possessed and acted upon by the insured at the time the premium fell due, obviated the necessity of the statutory notice prescribed by said statute of the State of New York.

THIRD.

Whether if such statute does apply to the case, the parties could and did waive the notice therein prescribed by a subsequent agreement entered into in Washington.

FOURTH.

Whether it was competent for the Legislature of the State of New York, under the said general statute of 1877, to alter and amend the charter of your petitioner, and if so, whether your petitioner, being a corporation created and chartered under a special act of the Legislature of the State of New York, was intended to be included and affected by said general act.

FIFTH.

Whether it was or is the meaning and intent of the Legislature of the State of New York, that the act of 1877, should apply to a business transaction taking place in the State of Washington, as disclosed by the record in this case, and whether said statute follows said corporation beyond the limits of the State of New York as a part of its charter, or whether the same is only operative in the State of New York upon corporate business there transacted.

SIXTH.

Whether the public policy of unrestricted liberty of contract conferred by its Legislature upon foreign corporations transacting business in the State of Washington, should be a controlling reason for determining the contract a Washington contract, and one not affected by the statute of New York.

SEVENTH.

If it should be held that the general statute of New

York of 1877, respecting premium notices applies to this case, whether the failure to give the notice prescribed by such statute can operate to render your petitioner liable for a greater measure of insurance than the amount of the premium paid will purchase.

EIGHTH.

In the event it should be held the statute of New York of 1877, as amended applies to this case, whether the penal consequences of failing to give the notice prescribed of premium falling due, will relieve the insured from paying further premiums and keep the policy alive as if such premiums had been paid.

NINTH.

Whether the failure to give notice of a particular premium maturing will have the effect of keeping the policy alive, notwithstanding subsequent premiums have not been paid.

TENTH.

Whether, although your petitioner failed to give the notice under the statute of New York of 1877, and the premiums due on each of the following four years preceding the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property without consideration, to require your petitioner, in case of the death of the insured, to pay the amount of the policy.

ELEVENTH.

In the event the statute of New York of 1877, should be held to apply, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the premiums past due and unpaid.

TWELFTH.

Whether, in event it is held that the Statute of New York applies, it is a law relieving the insured from the consequences of a breach of his contract; or whether it enters into the being and charter of the Mutual Life Insurance Company, and becomes a limitation upon its powers of contracting outside the State of New York.

THIRTEENTH.

Whether it was competent for the Mutual Life Insurance Company and the insured to enter into a mutual agreement in the State of Washington subsequent to the delivery of the policy, by which they mutually agreed to rescind and terminate the policy and each relieve the other from all its obligations and benefits.

FOURTEENTH.

Whether by the payment of the first annual premium and failing to pay all subsequent premiums, action can be maintained until payment or tender is made of the defaulted premiums.

FIFTEENTH.

Whether, in this action, pleading only the policy of insurance and of performance by the insured of the terms of the contract, a recovery can be had when plaintiff admits non-payment of all premiums subsequent to the first up to the death of the insured.

SIXTEENTH.

Whether, in this action, based upon the policy of insurance and the performance of its conditions, the plaintiff can admit the non-payment of the premiums subsequent to the first and recover against the defendant because the defendant fails to show the giving of notice pursuant to the statute of New York.

SEVENTEENTH.

Whether it is not a fatal departure from law to law for a plaintiff alleging as his cause of action a policy of insurance and the compliance with its terms and admitting the defense of non-payment of premiums to recover judgment because the defendant has failed to show compliance with the unpleaded statute of New York in regard to mailing notice of the due date of premium.

EIGHTEENTH.

Whether under the charter of the defendant company and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the company.

VII.

Your petitioner states that it has issued and now has outstanding in the different Territories and States of the Union many life insurance policies, and has entered into such contracts with large numbers of the residents and citizens of the State of Washington, and other life insurance corporations, created and organized under the laws of the State of New York, have entered into and now have outstanding numbers of similar policies in such States and Territories. That at the time of rendering its opinion in this case, the Honorable Circuit Court of Appeals rendered similar opinions and upon substantially the same questions in three other cases wherein your petitioner is plaintiff in error, and that another case in which your petitioner is plaintiff in error has been submitted to said Circuit Court of Appeals, involving the same questions, the said cases decided and pending aggregating over eighty-six thousand dollars ($86,000), and a number of similar cases are now pending for decision in the United States Circuit Court for the District of Washington. That in view of the large amount of money involved in this litigation and the other similar causes, and in view of the difference in judicial opinions respecting a number of the questions involved in the case, your petitioner represents that the gravity of the matters in this case is such that they should be authoritatively and finally adjudicated by this Honorable Court upon a full and fair presentation of the merits of the case (or such of them as the Court may direct), on the part of your petitioner and the said defendants in error, George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill in her own behalf.

That the Phinney case (No. 12 on calendar of this Court) against your petitioner involves the same general questions.

VIII.

Your petitioner states that a certified copy of the entire record in said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as a part of this application, in conformity to Rule 37 of this Honorable Court relating to cases in the Circuit Court of Appeals, and the same is marked "Exhibit A."

WHEREFORE, Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, certifying the said court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in said cause therein entitled "The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *vs.* George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill in her own behalf, defendants in error, No. 518," to the end that the said cause may be reviewed and determined by this Court as provided by Section 6 of an Act of Congress, entitled: "An Act to Establish Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and for Other Purposes," approved March 3d, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity to said act, and that the said judgment of the said

Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your Petitioner will ever pray.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. M'KENNEY,
ROBERT C. STRUDWICK,
Attorneys and Counsel for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
COUNTY OF NEW YORK, }

EDW. LYMAN SHORT, being duly sworn, says: That he is one of the attorneys and of counsel for The Mutual Life Insurance Company of New York, the Petitioner above named, and as such has had personal charge for it of the case in the foregoing petition named in the Circuit Court of Appeals for the Ninth Circuit. That he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

EDWARD LYMAN SHORT.

Subscribed and sworn to before me this 18th day of November, A. D. 1899.

ALFRED MACKAY,
[SEAL.] Notary Public,
New York Co.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 455.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

WALTER B. ALLEN, AS ADMINISTRATOR OF SAMUEL B. STEWART, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 24, 1899.
CERTIORARI AND RETURN FILED MAR 10 1900

(17,569.)

(17,569.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

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vs.

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1 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,
vs.
WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Defendant in Error.
} No. —.

Order Enlarging Time To File Clerk's Return and Docket Cause.

Now on this fifteenth day of February, 1899, upon the application of Messrs. Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error above named, and good and sufficient cause being shown and appearing therefor, it is ordered by the court that the time within which the clerk of the circuit court of the United States for the district of Washington shall make, transmit to, and file with, the clerk of the United States circuit court of appeals for the ninth circuit his return of the writ of error and copy of the record in the above-entitled cause, be, and the same is hereby, extended thirty days from the return day of said writ of error and the citation herein, to wit, thirty days from the twenty-first day of February, 1899, and that the time within which said plaintiff in error
2 shall docket said cause and file the record thereof with the clerk of said circuit court of appeals be and the same is hereby extended for the time above named.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States, and the Judge Who Allowed said Writ of Error and Signed said Citation.

(Endorsed:) (Original.) No. 519. In the United States circuit court of appeals for the ninth circuit. The Mutual Life Insurance Company of New York, plaintiff in error, *vs.* Walter B. Allen, as administrator of the estate of Samuel B. Stewart (deceased), defendant in error. Order enlarging time to file clerk's return and docket cause. Filed February 20, 1899. F. D. Monckton, clerk. Struve, Allen, Hughes & McMicken, for plaintiff in error, 520 Bailey building, Seattle, Wash.

In the Circuit Court of the United States, District of Washington, Northern Division.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.

3 *Complaint.*

The plaintiff complains of the defendant, and for a first cause of action alleges:

I.

That during all the times herein stated the defendant was and is now a corporation, duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in said State, and legally doing business in this State.

II.

That prior to the eighteenth day of February, 1893, one Samuel B. Stewart applied to the defendant for insurance upon his life, and thereafter, on the eighteenth day of February, 1893, the said defendant accepted said application, and on said day did enter into a contract of insurance with the said Samuel B. Stewart, and did issue and deliver to him, the said Samuel B. Stewart, a policy of insurance upon his life, which said contract of insurance and policy of insurance was in the words and figures following, to wit:

No. 543,104.

Man's life. Twenty-year distribution policy.

Mutual Life Insurance Company of New York.

Age, 22 years. Amount, $2,500.

In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Samuel B. Stewart, of Seattle, in the
4 county of King, State of Washington, his executors, administrators, or assigns, twenty-five hundred dollars, upon acceptance of satisfactory proofs at its home office of the death of said Samuel B. Stewart during the continuance of this policy, upon the following conditions, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made a part hereof:

Annual premium, $47.75.

The annual premium of forty-seven dollars and seventy-five cents shall be paid in advance on the delivery of this policy, and

thereafter to the company, at its home office in the city of New York, on the eighteenth day of February in every year during the continuance of this contract.

In witness whereof, the said Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary at its office in the city of New York, the eighteenth day of February, A. D. one thousand eight hundred and ninety-three.

RICHARD McCURDY, *President.*
C. F. SCHRODER, *Ass't Secretary.*

The receipt of the first payment of premium hereon is acknowledged.

W. J. EASTON, *Secretary.*

Provisions, Requirements, and Benefits.

Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York,
5 but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided.

Dividends.—This policy is issued on the twenty-year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of twenty years from the date of issue. Only twenty-year distribution policies in force at the end of such term, and entitled thereto by year of issue, shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied at the end of such period to purchase an annuity, or may then be drawn in cash. After the expiration of the period of twenty years hereinabove provided for, the dividend distribution periods shall be changed to terms of five years each during the continuance of this policy. The surplus may be applied at each distribution to purchase additional insurance without medical examination, provided such application of the surplus be elected in due form not less than two years before the end of the first dividend period
6 of twenty years; otherwise, a satisfactory examination will be required for each such application of the surplus. But should the owner of the policy at the end of said first period of twenty years, or at the end of any subsequent period of five years, elect to receive the dividends annually, the surplus applicable on this policy will thereafter be apportioned at the beginning of each year on the anniversary of the date of this policy, and may be applied as hereinbefore provided.

Paid-up policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the amount required by the provisions of the act of May 21, 1879, chapter 347, Laws of the State of New York.

Surrender for cash value.—This policy may be surrendered to the company at the end of the said first period of twenty years, and the full reserve computed by the American table of mortality, and four per cent. interest, and the surplus as defined above, will be paid therefor in cash.

Surrender for life income.—Or if this policy be surrendered as above provided, the total cash value may, at the option of the policy-holder, be applied to the purchase of an annuity for life, according to the published rates of the company at the time of such surrender.

Insurance with annuity.—If the policy be surrendered at the end of the first dividend period as above provided, the company will, if requested in writing, apply its cash value, including surplus,
7 or any part of such value, to purchase without medical examination, a paid-up policy for the same amount as the value so applied, securing insurance for life and participating annually in dividends, together with a paid-up annuity for life equal to three and one-half per cent. per annum of the amount of the paid-up insurance, payments of the annuity to commence one year after the end of said first dividend period.

Incontestability.—It is hereby further agreed and promised that after two years from the date hereof, the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age, and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

Notice to the holder of this policy.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignment of this policy until the original assignment, or a duplicate or certified copy thereof, shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

8 38 B.

Man's life. Twenty-year dist., Aug., 1891.

It is hereby mutually understood and agreed that as the within Samuel B. Stewart has not been successfully vaccinated, he is not insured under this policy as against death in consequence of varioloid or variola.

Income life.

No. 543,104.

The Mutual Insurance Company of New York.—Insurance on the life of Samuel B. Stewart. Amount, $2,500. Date, Feb. 18, 1893. Term of life. Annual premium, $47.75.

III.

That in the application made by the said Samuel B. Stewart for said policy, which said application is by the terms of said policy made a part thereof, it was stated that the said policy of insurance was to be issued under and by virtue and subject to the provisions of the laws of the State of New York, and said contract of insurance and policy was made and issued under and by virtue of and subject to the laws of the State of New York.

IV.

That the said Samuel B. Stewart did, at the time of the issuance and deliverance to him of the said policy, pay to the said defendant the annual premium thereon, to wit, did pay the sum of forty-seven and seventy-five one-hundredths ($47.75) in cash.

V.

That on the ninth day of July, 1897, the said Samuel B. Stewart died intestate.

9 VI.

That the death of the said Samuel B. Stewart was not caused, nor did he die in consequence of, nor was he afflicted with or by varioloid or variola.

VII.

That he, the said Samuel B. Stewart did, during his lifetime, do and perform all agreements which, under said policy of insurance, he was obligated to do and perform.

VIII.

That subsequent to the death of the said Samuel B. Stewart, to wit, on or about the — day of August, 1897, certain proceedings were taken in the superior court of King county, State of Washington, a court of general jurisdiction, for the purpose of having an administrator appointed of the estate of Samuel B. Stewart; that

certain proceedings were had in said matter to the end that on the twenty-eighth day of August, 1897, the plaintiff herein, Walter B. Allen, was duly and regularly appointed administrator of the estate of the said Samuel B. Stewart, and on said day letters of administration were duly and regularly issued to him, the said Walter B. Allen, the plaintiff, as such administrator. That said superior court then and there had full and complete jurisdiction of said matter.

IX.

That immediately thereafter, to wit, on the twenty-eighth day of August, 1897, the said plaintiff, Walter B. Allen, did duly
10 qualify as administrator, and has been ever since said time, and is now, the duly appointed, qualified, and acting administrator of said estate.

X.

That the said plaintiff Walter B. Allen is a citizen and resident of the State of Washington.

XI.

That he, the said Walter B. Allen, on or about the fifteenth day of September, 1897, made due proofs of death of the said Samuel B. Stewart, and did furnish and deliver the same to the said defendant; that the said defendant received said proofs of death and of loss, and has made no objection thereto.

XII.

That thereafter the plaintiff demanded payment from the said defendant of the amount due under said policy, which said demand the said defendant refused to grant.

XIII.

That the said plaintiff has done and performed all acts and things necessary to be done and performed by him under and by virtue of said policy and contract of insurance.

And for a further and second cause of action the plaintiff alleges:

I.

That during all the times herein stated the defendant was and is now a corporation, duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in said State, and legally doing business in this State.

11 II.

That prior to the eighteenth day of February, 1893, one Samuel B. Stewart applied to the defendant for insurance upon his life, and thereafter, on the eighteenth day of February, 1893, the said defendant accepted said application, and on said day did enter into a contract of insurance with the said Samuel B. Stewart, and did issue

and deliver to him, the said Samuel B. Stewart, a policy of insurance upon his life, which said contract of insurance was in the words and figures following, to wit:

No. 54106.

Man's life, limited payment.

Twenty-year Distribution Policy.

Mutual Life Insurance Company of New York.

Age, 22 years. Amount, $2,500.

In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Samuel B. Stewart, of Seattle, in the county of King, State of Washington, his executors, administrators, or assigns, twenty-five hundred dollars, upon acceptance of satisfactory proof at its home office of the death of said Samuel B. Stewart during the continuance of this policy, upon the following conditions, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made a part hereof:

Annual premium for twenty years, $60.50.

12 The annual premium of sixty-six dollars and fifty cents shall be paid in advance on the delivery of this policy, and thereafter, to the company at its home office in the city of New York, on the eighteenth day of February in every year during the continuance of this contract until premiums for twenty full years shall have been duly paid to said company.

In witness whereof, the said Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary at its office in the city of New York, the eighteenth day of February, A. D. one thousand eight hundred and ninety-three.

RICHARD McCURDY, *President.*

The receipt of the first payment of premium hereon is acknowledged.

W. J. EASTON, *Secretary.*

Provisions, Requirements, and Benefits.

Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall

13 be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments

previously made shall be forfeited to the company, except as hereinafter provided.

Dividends.—This policy is issued on the twenty-year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of twenty years from the date of issue. Only twenty-year distribution policies in force at the end of such term, and entitled thereto by year of issue, shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied at the end of such period to purchase additional insurance, or may then be drawn in cash. After the expiration of the period of twenty years hereinabove provided for, the dividend distribution periods shall be changed to terms of five years each during the continuance of this policy. The surplus may be applied at each distribution to purchase additional insurance without medical examination, provided such application of the surplus be elected in due form not less than two years before the end of the first dividend period of twenty years; otherwise, a satisfactory examination will be required for each such application of the surplus. But should the owner of the policy at the end of said first period of twenty years, or at the end of any subsequent period of five years, elect to receive the dividends annually, the surplus applicable on this policy will thereafter be apportioned at the beginning of each year on the anniversary of the date of this policy, and may be applied as hereinbefore provided.

Paid-up policy.—After three full annual premiums have
14 been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which the number of full year's premium paid bears to the total number required.

Surrender.—This policy may be surrendered to the company at the end of the said first period of twenty years, and the full reserve computed by the American table of mortality, and four per cent. interest and the surplus as defined above will be paid therefor in cash.

Insurance with annuity.—If the policy be surrendered at the end of the first dividend period as above provided, the company will, if requested in writing, apply its cash value, including surplus, or any part of such value, to purchase without medical examination, a paid-up policy for the same amount as the value so applied, securing insurance for life and participating annually in dividends, together with a paid-up annuity for life equal to three and one-half per cent. per annum of the amount of the paid-up insurance, payments of the annuity to commence one year after the end of said first dividend period.

Incontestability.—It is hereby further agreed and promised and agreed that after two years from the date hereof, the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the man-

ner stipulated in said policy, and that the requirements of the company as to age, and military or naval service in time of war
15 shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

Notice to the holder of this policy.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignment of this policy until the original assignment, or a duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

39 B.

Man's life, lim. payment. Twenty-year dist., June, 1889.

It is hereby mutually agreed and understood that as the within-named Samuel B. Stewart has not been successfully vaccinated, he is not insured under this policy as against death in consequence of varioloid or variola.

The policy is indorsed as follows:

Income life.

Limited payment.

No. 543,106.

The Mutual Life Insurance Company of New York.—Insurance on the life of Samuel B. Stewart. Amount, $2,500. Date, February 18, 1893. Term of life. Annual premium for twenty years, $66.50.

16 III.

That in the application made by the said Samuel B. Stewart for said policy, which said application is by the terms of said policy made a part thereof, it was stated that the said policy of insurance was to be issued under and by virtue and subject to the provisions of the laws of the State of New York, and said contract of insurance and policy was made and issued under and by virtue of and subject to the laws of the State of New York.

IV.

That the said Samuel B. Stewart did, at the time of the issuance and deliverance to him of the said policy, pay to the said defendant the annual premium thereon, to wit, did pay the sum of sixty-six and fifty one-hundredths ($66.50) dollars in cash.

V.

That on the ninth day of July, 1897, the said Samuel B. Stewart died intestate.

VI.

That the death of the said Samuel B. Stewart was not caused, nor did he die in consequence of, nor was he afflicted with or by varioloid or variola.

VII.

That he, the said Samuel B. Stewart did, during his lifetime, do and perform all agreements which, under said policy of insurance, he was obligated to do and perform.

17

VIII.

That subsequent to the death of the said Samuel B. Stewart, to wit, on or about the — day of August, 1897, certain proceedings were taken in the superior court of King county, State of Washington, a court of general jurisdiction, for the purpose of having an administrator appointed of the estate of Samuel B. Stewart; that certain proceedings were had in said matter to the end that on the twenty-eighth day of August, 1897, the plaintiff herein, Walter B. Allen, was duly and regularly appointed administrator of the estate of the said Samuel B. Stewart, and on said day letters of administration were duly and regularly issued to him, the said Walter B. Allen, the plaintiff, as such administrator; that said superior court then and there had full and complete jurisdiction over all of said matter.

IX.

That immediately thereafter, to wit, on the twenty-eighth day of August, 1897, the said Walter B. Allen did duly qualify as administrator, and has been ever since said time, and is now, the duly appointed, qualified, and acting administrator of said estate.

X.

That the said plaintiff Walter B. Allen is a citizen and resident of the State of Washington.

XI.

That he, the said Walter B. Allen, on or about the fifteenth day of September, 1897, made due proofs of death of the said
18 Samuel B. Stewart, and did furnish and deliver the same to the said defendant; that the said defendant received said proofs of death and of loss, and has made no objection thereto.

XII.

That thereafter, the plaintiff demanded of the said defendant payment of the amount due under said policy, which said demand the said defendant refused to grant.

XIII.

That the said plaintiff has done and performed all acts and things necessary to be done and performed by him under and by virtue of said policy and contract of insurance.

Wherefore, plaintiff prays judgment against the defendant in the sum of five thousand ($5,000.00) dollars, together with interest thereon from the ninth day of July, 1897, and the costs and disbursements of this action.

ALLEN & ALLEN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of King, }

Walter B. Allen, being first duly sworn, upon his oath says that he is the plaintiff in the above-entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and that the same is true.

WALTER B. ALLEN.

19 Subscribed and sworn to before me this twenty-third day of December, 1897.

JAY C. ALLEN,
[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Residing at Seattle.*

(Endorsed:) Complaint. Filed Dec. 28, 1897, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

United States Circuit Court for the District of Washington.

WALTER B. ALLEN, Administrator, Plaintiff,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant. } No. 654.

Pracipe for Appearance of Attorneys for Plaintiff.

To the clerk of the above-entitled court:

You will please enter our appearance as attorneys for plaintiff in the above-entitled cause.

ALLEN & ALLEN,
Attorneys-at-law, 43–47 *Dexter, Horton & Co.'s Bank Bldg., Seattle.*

(Endorsed:) Præcipe for appearance. Filed Dec. 28, 1897. A. Reeves Ayres, clerk. A. N. Moore, deputy clerk.

20 United States Circuit Court for the District of Washington.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Plaintiff,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.
} No. 654.

Præcipe for Appearance of Attorneys for Defendant.

To the clerk of the above-entitled court:

You will please enter our appearance as attorneys for defendant in the above-entitled cause.

STRUVE, ALLEN, HUGHES & McMICKEN AND STRUDWICK & PETERS.

(Endorsed:) Præcipe for appearance. Filed January 29, 1898. A. Reeves Ayres, clerk. H. M. Walthew, deputy.

21 In the Circuit Court of the United States for the District of Washington, Northern Division.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Plaintiff,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.
} No. 654.

Answer.

The above-named defendant, Mutual Life Insurance Company of New York (a corporation), makes answer to the first cause of action in the plaintiff's complaint set forth as follows:

I.

For answer to paragraph two of said first cause of action, defendant admits that prior to the eighteenth day of February, 1893, the said Samuel B. Stewart applied to defendant for insurance upon his life, and that thereafter the defendant accepted said application, but denies that it accepted the same on the eighteenth day of February or prior to the first day of March, 1893, and denies that it entered into said contract for the insurance with the said Samuel B. Stewart, or delivered to him prior to the first day of March, 1893, a policy of insurance upon his life.

22 II.

For answer to paragraph three of said first cause of action, defendant admits that said application by its terms was made a part of said policy, but denies each and every other allegation in said paragraph three contained.

III.

For answer to paragraph four of said first cause of action, defendant admits that at the time of the deliverance to the said Samuel B. Stewart of the said policy of insurance, the said Stewart paid to the defendant the annual premium thereon, to wit, forty-seven dollars and seventy-five cents ($47.75), in cash, but denies each and every allegation in said paragraph contained.

IV.

For answer to paragraph seven, defendant denies the same and each and every allegation therein contained.

V.

For answer to paragraph thirteen of said first cause of action, defendant denies the same and each and every allegation therein contained.

Defendant makes answer to the second cause of action set forth in said complaint, as follows:

I.

For answer to paragraph two, defendant admits that prior to the eighteenth day of February, 1893, the said Samuel B. Stewart applied to the defendant for insurance upon his life, and thereafter defendant accepted said application and entered into a con-
23 tract of insurance with the said Samuel B. Stewart and issued and delivered to him policy of insurance upon his life, but defendant denies that the same was delivered to said Samuel B. Stewart prior to the first day of March, 1893.

II.

For answer to paragraph three of said second cause of action, defendant admits that the application therein named was by its terms made a part of said policy of contract of insurance, but denies each and every other allegation in said paragraph three contained.

III.

For answer to paragraph four, defendant admits that the said Samuel B. Stewart did at the time of the deliverance to him of the said policy, pay the defendant the annual premium thereon in the sum of sixty-six dollars and fifty cents ($66.50), but denies each and every other allegation in said paragraph contained.

IV.

For answer to paragraph seven, defendant denies the same and each and every allegation therein contained.

V.

For answer to paragraph thirteen, defendant denies the same and each and every allegation therein contained.

And by way of a first and affirmative defense to the first cause of action in said complaint set forth, this defendant alleges:

I.

That the defendant is and at all the times mentioned in the said complaint was a corporation, created, organized, and existing
24 under and by virtue of the laws of the State of New York, and is and was at all said times engaged in transacting a life-insurance business in the State of Washington, under and by virtue of and in pursuance of the laws of the State of Washington, and having its principal place of business for the transaction of business in said State at the city of Seattle.

II.

That on the seventeenth day of February, 1893, one Samuel B. Stewart, the decedent in the complaint mentioned, who was then and there and for several years subsequent thereto, a citizen and resident of the State of Washington, made, signed and delivered to this defendant, at its office in the city of Seattle, State of Washington, his written application to defendant for a policy of insurance upon his life, in the sum of twenty-five hundred dollars ($2,500), which application became and was, pursuant to its terms, and the terms of the policy hereinafter mentioned, a part of said policy and of the contract of insurance evidenced thereby.

III.

That the said application contains among other things a stipulation and condition to the effect that the policy to be issued by the defendant pursuant to said application "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health."

IV.

That thereupon the agent of the defendant in said city of
25 Seattle transmitted said application of the said Samuel B. Stewart to the general agent of the defendant in San Francisco, California, by whom said application was transmitted to the defendant in the city and county of New York, State of New York. That thereafter the defendant, pursuant to the said application, issued its policy of insurance upon the life of the said Samuel B. Stewart, being the policy mentioned in plaintiff's first cause of action, and caused the same to be transmitted to its said general agent in San Francisco, California, and thereafter the said agent of defendant in San Francisco, California, caused the said policy to be sent and transmitted to the agent of defendant in the city of Seattle in the State of Washington, to be there delivered upon payment of the first premium in said policy provided by the said Samuel B. Stewart, and that at the city of Seattle aforesaid the said agent of defendant did receive from the said Samuel B. Stewart payment of the said first annual pre-

mium, and did then and there deliver the said policy of insurance to the said Samuel B. Stewart, and by the terms thereof the said policy then and there took effect and became obligatory upon the parties thereto.

V.

That it was provided in said policy that an annual premium of forty-seven dollars and seventy-five cents ($47.75) should be paid in advance on the delivery of said policy, and thereafter on the eighteenth day of February in every year during the continuance of said contract or policy of insurance, and it is also in said policy provided as follows: "Notice that each and every payment is due on the date named in the policy is given and accepted by the
26 delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

VI.

That pursuant to the conditions of the said policy aforesaid, there became and was due to the defendant as a premium upon said policy of insurance, on the eighteenth day of February, 1894, the sum of $47.75, and that the said Samuel B. Stewart neglected and refused to pay the said premium of $47.75, or any part thereof, and ever since and up to the time of the death of said Samuel B. Stewart he had failed, neglected and refused to pay the said defendant the said premium or any part thereof, or any sum or other thing of value whatever, and by reason thereof the said policy of insurance became on the eighteenth day of February, 1894, according to the conditions thereof, void and of no effect, and the same then and there became and was forfeited and lapsed; that there has never been paid or tendered to defendant the whole or any part of any premium on said policy of insurance, save and except the sum of $47.75, the first annual premium thereon, paid as aforesaid on the delivery of the said policy.

And by way of a further and second affirmative defense to said first cause of action, defendant alleges:

27 I.

That the defendant is, and at all times mentioned in the complaint was, a corporation created, organized and existing under and by virtue of the laws of the State of New York, and is and was at all times engaged in transacting a life-insurance business in the State of Washington, under and by virtue of and in pursuance of the laws of the State of Washington, and having its principal place of business for the transaction of business in said State, at the city of Seattle.

II.

That prior to the eighteenth day of February, 1893, one Samuel B. Stewart (deceased in said complaint mentioned), who then and

there was, and for several years thereafter continued to be, a citizen and resident of the State of Washington, made, signed and delivered to this defendant, at its office in the city of Seattle, State of Washington, his written application to defendant for a policy of insurance upon his life, in the sum of twenty-five hundred dollars ($2,500), which application became and was, pursuant to its own terms, and the terms of the policy hereinafter mentioned, a part of such policy and of the contract of insurance evidenced thereby.

III.

That the said application contains among other things a stipulation and condition to the effect that the policy to be issued by the defendant pursuant thereto "shall not take effect until the first premium shall have been paid and the policy shall have been delivered."

28 IV.

That thereupon the agent of the defendant in said city of Seattle transmitted said policy of said Samuel B. Stewart to the general agent of defendant in San Francisco, California, by whom said application was transmitted to this defendant in the city and State of New York. That thereafter the defendant, pursuant to the said application, issued its policy of insurance mentioned in plaintiff's first cause of action upon the life of the said Samuel B. Stewart, and transmitted the same to its said agent in San Francisco, California, and thereafter the said agent of the defendant at San Francisco caused the said policy to be transmitted to the agent of defendant in the city of Seattle aforesaid, to be there delivered to said Samuel B. Stewart upon payment of the first premium in said policy provided, and that at the said city of Seattle the said agent did receive from the said Samuel B. Stewart payment in cash of said premium, to wit, forty-seven dollars and seventy-five cents ($47.75), and did then and there deliver the said policy to said Samuel B. Stewart, and by the terms thereof the said policy took effect and became obligatory upon the said parties thereto.

V.

That it was provided in said policy of insurance as one of the conditions thereof that "An annual premium of forty-seven dollars and seventy-five cents ($47.75) shall be paid in advance on the delivery of said policy, and thereafter on the eighteenth day of February in every succeeding year during the continuance of said policy," and it was also provided in said policy of insurance,
29 as one of the conditions thereof, as follows: "Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. That part of the year's pre-

mium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

VI.

That neither the said Samuel B. Stewart nor any one on his behalf ever paid, or offered to pay, any premium or any part of any premium due or to become due or payable on said policy, save and except the first premium, which was paid upon the delivery of said policy, and which covered the period from the date of said policy until the eighteenth day of February, 1894. That the said Samuel B. Stewart was at all times advised and informed that default had been made by him in the payment of each and every premium and the whole thereof due on said policy, subsequent to the said first annual premium paid at the delivery of said policy; and that the said Samuel B. Stewart in his lifetime never paid or offered
30 to pay any premium, or any part of any premium, due upon said policy subsequent to that paid upon the delivery thereof as aforesaid. That it was expressly in said policy provided that the insurance thereon was payable to the insured, Samuel B. Stewart, or his assigns; that the said Samuel B. Stewart never made any transfer or assignment of said policy of insurance; that the said defendant entered and noted said policy of insurance upon its books as forfeited and lapsed for failure to pay the annual premium falling due on said policy on said eighteenth day of February, 1894. That the said Samuel B. Stewart was at all times advised that defendant had so treated said policy as lapsed and forfeited, and notwithstanding said notice and notwithstanding the said Samuel B. Stewart was at all times advised he had not paid the premium due on said policy February 18, 1894, consented to the forfeiture and termination of said policy of insurance; and, with a mutual knowledge and understanding on the part of defendant and said Samuel B. Stewart, the said policy was at all times by the said parties deemed terminated from and after the eighteenth day of February, 1894; and relying upon such knowledge and mutual understanding, the said defendant never subsequently mailed or served any notice of the due date of premiums to or upon said Samuel B. Stewart during his lifetime, and the said Samuel B. Stewart, at all times knowing that defendant was treating said policy as forfeited and lapsed, and at all times knowing that he had not paid or tendered payment of any premium upon said policy subsequent to the first annual premium paid as aforesaid on the delivery of said policy, acquiesced in and agreed to the said mutual understanding
31 that the said policy was lapsed and forfeited, and by mutual agreement and consent, both the said defendant and said Samuel B. Stewart agreed and consented to the lapsing and forfeiture of said policy of insurance from and after the eighteenth day of February, 1894.

And by way of a first separate and affirmative defense to the second cause of action in the complaint pleaded, defendant alleges:

I.

That the defendant is, and at all the times mentioned in the said complaint was, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, and is and was at all said times engaged in transacting a life-insurance business in the State of Washington, under and by virtue of and in pursuance of the laws of the State of Washington, and having its principal place of business for the transaction of business in said State at the city of Seattle.

II.

That on the seventeenth day of February, 1893, one Samuel B. Stewart, the decedent in the complaint mentioned, who was then and there and for several years subsequent thereto a citizen and resident of the State of Washington, made, signed and delivered to this defendant, at its office in the city of Seattle, State of Washington, his written application to defendant for a policy of insurance upon his life, in the sum of twenty-five hundred dollars ($2,500), which application became and was, pursuant to its terms, and the
32 terms of the policy hereinafter mentioned, a part of said policy and of the contract of insurance evidenced thereby.

III.

That the said application contains, among other things, a stipulation and condition to the effect that the policy to be issued by the defendant, pursuant to said application, "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health."

IV.

That thereupon the agent of the defendant in said city of Seattle transmitted said application of the said Samuel B. Stewart to the general agent of the defendant in San Francisco, California, by whom said application was transmitted to the defendant in the city and county of New York, State of New York. That thereafter the defendant, pursuant to the said application, issued its policy of insurance upon the life of the said Samuel B. Stewart, being the policy mentioned in plaintiff's second cause of action, and caused the same to be transmitted to its said general agent in San Francisco, California, and thereafter the said agent of defendant in San Francisco, California, caused the said policy to be sent and transmitted to the agent of defendant in the city of Seattle in the State of Washington, to be there delivered upon payment of the first premium in said policy provided by the said Samuel B. Stewart, and that at the city of Seattle aforesaid the said agent of defendant did receive from the said Samuel B. Stewart payment of the first annual premium,
33 and did then and there deliver the said policy of insurance to the said Samuel B. Stewart, and by the terms thereof the

said policy then and there took effect and became obligatory upon the parties thereto.

V.

That it was provided in said policy that an annual premium of sixty-six dollars and fifty cents ($66.50) shall be paid in advance on the delivery of said policy and thereafter on the eighteenth day of February in every year during the continuance of said contract or policy of insurance and it is also in said policy, provided as follows: "Notice that each and every payment is due on the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. If this policy shall become void by non-payment of premium all payments previously made shall be forfeited to the company except as hereinafter provided."

VI.

That pursuant to the conditions of the said policy aforesaid, there became and was due to the defendant as a premium upon said policy of insurance, on the eighteenth day of February, 1894, the sum of $66.50, and that the said Samuel B. Stewart neglected and refused to pay the said premium of $66.50, or any part thereof, and ever since and up to the time of the death of said Samuel B. Stewart he had failed, neglected and refused to pay the said defendant the said premium or any part thereof, or any sum or other thing of value whatever, and by reason thereof the said policy of in-
34 surance became on the eighteenth day of February, 1894, according to the conditions thereof, void and of no effect, and the same then and there became and was forfeited and lapsed; that there has never been paid or tendered to defendant the whole or any part of any premium on said policy of insurance save and except the sum of $66.50, the first annual premium thereon, paid as aforesaid on the delivery of the said policy.

And for a further and second affirmative defense to the second cause of action in the complaint set forth, defendant alleges:

I.

That the defendant is, and at all the times mentioned in the complaint was, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, and is and was at all times engaged in transacting a life-insurance business in the State of Washington, under and by virtue of and in pursuance of the laws of the State of Washington, and having its principal place of business for the transaction of business in said State, at the city of Seattle.

II.

That prior to the eighteenth day of February, 1893, one Samuel B. Stewart (deceased in said complaint mentioned), who then and there was, and for several years thereafter continued to be, a citizen

and resident of the State of Washington, made, signed and delivered to this defendant, at its office in the city of Seattle, State of Washington, his written application to defendant for a policy of
35 insurance upon his life, in the sum of twenty-five hundred dollars ($2,500), which application became and was, pursuant to its own terms and the terms of the policy hereinafter mentioned, a part of such policy and of the contract of insurance evidenced thereby.

III.

That the said application contains, among other things, a stipulation and condition to the effect that the policy to be issued by the defendant pursuant thereto "shall not take effect until the first premium shall have been paid and the policy shall have been delivered."

IV.

That thereupon the agent of the defendant in said city of Seattle transmitted said policy of said Samuel B. Stewart to the general agent of defendant in San Francisco, California, by whom said application was transmitted to this defendant in the city and State of New York. That thereafter the defendant, pursuant to the said application, issued its policy of insurance mentioned in plaintiff's second cause of action upon the life of the said Samuel B. Stewart and transmitted the same to its said agent in San Francisco, California, and thereafter the said agent of defendant at San Francisco caused the said policy to be transmitted to the agent of defendant in the city of Seattle aforesaid, to be there delivered to said Samuel B. Stewart upon payment of the first premium in said policy provided, and that at the said city of Seattle the said agent did receive from the said Samuel B. Stewart payment in cash of said premium, to wit, sixty-six dollars and fifty cents ($66.50), and did then
36 and there deliver the said policy to said Samuel B. Stewart and by the terms thereof the said policy took effect and became obligatory upon the said parties thereto.

V.

That it was provided in said policy of insurance as one of the conditions thereof that "An annual premium of sixty-six dollars and fifty cents ($66.50) shall be paid in advance on the delivery of said policy, and thereafter on the eighteenth day of February in every succeeding year during the continuance of said policy," and it was also provided in said policy of insurance, as one of the conditions thereof, as follows: "Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due

and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

VI.

That neither the said Samuel B. Stewart nor any one on his behalf ever paid or offered to pay any premium, or any part of any premium due, or to become due or payable on said policy, save and except the first premium, which was paid upon the delivery
37 of said policy, and which covered the period from the date of said policy until the eighteenth day of February, 1894. That the said Samuel B. Stewart was at all times advised and informed that default had been made by him in the payment of each and every premium and the whole thereof due on said policy, subsequent to the said first annual premium paid at the delivery of said policy; and that the said Samuel B. Stewart in his lifetime never paid or offered to pay any premium, or any part of any premium, due upon said policy subsequent to that paid upon the delivery thereof as aforesaid. That it was expressly in said policy provided that the insurance thereon was payable to the insured, Samuel B. Stewart, or his assigns; that the said Samuel B. Stewart never made any transfer or assignment of said policy of insurance; that the said defendant entered and noted said policy of insurance upon its books as forfeited and lapsed for failure to pay the annual premium falling due on said policy on said eighteenth day of February, 1894. That the said Samuel B. Stewart was at all times advised that defendant had so treated said policy as lapsed and forfeited, and notwithstanding said notice, and notwithstanding the said Samuel B. Stewart was at all times advised he had not paid the premium due on said policy, February 18, 1894, consented to the forfeiture and termination of said policy of insurance; and with a mutual knowledge and understanding on the part of defendant and said Samuel B. Stewart, the said policy was at all times by the said parties deemed terminated from and after the eighteenth day of February, 1894; and relying upon such knowledge and mu-
38 tual understanding, the said defendant never subsequently mailed or served any notice of the due date of premises to or upon said Samuel B. Stewart during his lifetime, and the said Samuel B. Stewart, at all times knowing that defendant was treating said policy as forfeited and lapsed, and at all times knowing that he had not paid or tendered payment of any premium upon said policy subsequent to the first annual premium paid as aforesaid on the delivery of said policy, acquiesced in and agreed to the said mutual understanding that the said policy was lapsed and forfeited, and by mutual agreement and consent, both the said defendant and said Samuel B. Stewart agreed and consented to the lapsing and forfeiture of said policy of insurance from and after the eighteenth day of February, 1894.

Wherefore, defendant prays that plaintiff take nothing by his

said action, and that defendant recover its costs and disbursements herein to be taxed.

STRUVE, ALLEN, HUGHES & McMICKEN AND
STRUDWICK & PETERS,
Attorneys for Defendant.

STATE OF WASHINGTON, }
County of King, } *ss.:*

A. W. Engle, being first duly sworn, on oath deposes and says: That he is an agent of the defendant in the foregoing-entitled action, authorized by said defendant to solicit insurance in this State, and for that reason he makes this affidavit in verification of said answer, on behalf of said defendant; that he has read said answer, knows the contents thereof and believes the same to be true.

A. W. ENGLE.

39 Subscribed and sworn to before me this twenty-sixth day of January, 1898.

[NOTARIAL SEAL.]

H. K. STRUVE,
Notary Public in and for the State of Washington, Residing at Seattle, in said State.

Copy of within answer received and due service of same acknowledged this twenty-sixth day of January, 1898.

ALLEN & ALLEN,
Attorneys for Plaintiff.

(Endorsed:) Answer. Filed Jan. 29, 1898, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.

Demurrer to Answer.

Comes now the plaintiff, and demurs to the first affirmative
40 defense contained in the answer of the defendant to the first cause of action, for the reason that said defense does not state facts sufficient to constitute a defense to said cause of action, or to any part thereof.

And the plaintiff further demurs to the first affirmative defense contained in the answer of the defendant to the second cause of action, for the reason that said separate and affirmative defense does not state facts sufficient to constitute a defense to the second cause of action, or to any part thereof.

ALLEN & ALLEN,
Attorneys for the Plaintiff.

STATE OF WASHINGTON, } ss:
County of King, }

I, Jay C. Allen, one of the attorneys for the plaintiff herein, do hereby certify that, in my opinion, the above demurrer, and all thereof, is in point of law well taken.

JAY C. ALLEN.

We hereby acknowledge the receipt of a copy and service of the within demurrer, this ninth day of February, 1898.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

(Endorsed:) Demurrer to answer. Filed February 9, 1898, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

41 In the Circuit Court of the United States for the District of Washington, Northern Division.

WALTER B. ALLEN, Administrator, }
vs.
MUTUAL LIFE INSURANCE CO. }

Opinion.

This action is founded upon two policies of insurance issued by an insurance company of the State of New York. Each policy provides for the payment of annual premiums at the home office of the company in the State of New York, and for performance of the contract at the same place. Each policy makes the application for insurance a part of the contract, and in the application it is recited that the contract is to be governed by the laws of the State of New York. The answer admits the policies as pleaded in the complaint, and admits that the first annual premiums were paid, and that each policy was delivered and took effect as a binding contract. The case therefore, comes within the rule laid down in the decision of this court in the case of Phinney *v.* Mutual Life Insurance Co. of New York. I adhere to the opinion expressed in that decision, and therefore sustain the demurrer to the first affirmative defenses pleaded in the answer as to each of the policies.

C. H. HANFORD, *Judge.*

(Endorsed:) Opinion. Filed May 28, 1898. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

42 In the United States Circuit Court for the District of Washington, Northern Division.

WALTER B. ALLEN, as Administrator of the Estate of Sam. B. Stewart, Plaintiff,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.

Demurrer to Second Affirmative Defense.

Comes now the plaintiff and demurs to the second affirmative defense interposed by the defendant to the first cause of action upon the ground and for the reason that said second affirmative defense does not state facts sufficient to constitute a defense to said first cause of action.

And the plaintiff further demurs to the second affirmative defense contained in the answer of the defendant to the second cause of action upon the ground, and for the reason that said second affirmative defense does not state facts sufficient to constitute a defense to said second cause of action.

ALLEN & ALLEN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of King, }

I, Jay C. Allen, one of the attorneys for the plaintiff herein, do hereby certify that in my opinion the above demurrer and all thereof, is in point of law well taken.

JAY C. ALLEN.

43 We hereby acknowledge the receipt of a copy and service of the within demurrer this nineteenth day of December, 1898.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

(Endorsed:) Demurrer. Filed Dec. 22, 1898, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

In the Circuit Court of the United States for the Ninth Circuit, District of Washington, Northern Division.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW York (a Corporation), Defendant. } No. 654.

Judgment.

This cause having been duly and regularly heard on the sixteenth day of May, 1898, upon the plaintiff's demurrer to the first

affirmative defense contained in the answer of the defendant to the alleged first cause of action in plaintiff's complaint herein and to the first affirmative defense contained in the answer of the defendant to the alleged second cause of action in plaintiff's complaint herein, and the court having heard the arguments of counsel thereon, and having taken the same under advisement,
44 and afterward, on the twenty-eighth day of May, 1898, duly filed its opinion thereon;

And now, on this, the thirty-first day of December, 1898, the said cause coming on duly and regularly to be heard upon the said plaintiff's demurrer to the second affirmative defense contained in the answer of the defendant to the alleged first cause of action in plaintiff's complaint herein, and to the second affirmative defense contained in the answer of the defendant to the alleged second cause of action in plaintiff's complaint herein, and the court having heard the argument of counsel thereon, and having duly considered the same;

And the court now, on this thirty-first day of December, 1898, being fully advised in the premises, it is by the court ordered that said demurrers, and each of them to each and all of said affirmative defenses be, and the same hereby are, sustained; to which ruling of the court sustaining said demurrers and each of them as to each and all of said affirmative defenses, defendant by its counsel in open court at the time duly excepts, and its exception is separately allowed by the court as to each of said demurrers to all and each of said respective affirmative defenses and each of the grounds of said demurrers.

Thereupon the defendant, by its counsel in open court, announces that it does not desire to amend its said answer, or any of said affirmative defenses, but elects to stand thereon, and refuses to plead further. Whereupon the plaintiff, by its counsel moves the court for judgment in favor of said plaintiff and against the
45 defendant upon said demurrers, and the court being now fully advised in the premises, grants said motion and orders judgment accordingly. To which action of the court in granting said motion for judgment and ordering judgment, defendant at the time excepts and its exception is allowed.

And the plaintiff having afterward, on said thirty-first day of December, 1898, filed in this court the policies of insurance sued on, from which it appears to the court that there was due on the ninth day of July, 1897, the sum of $4,588.00, which sum should bear interest from that date at the rate of six per cent. per annum.

It is therefore considered, adjudged, and decreed that the plaintiff, Walter B. Allen, as administrator of the estate of Samuel B. Stewart, deceased, do have and recover of and from the Mutual Life Insurance Company of New York, the sum of five thousand and ninety one-hundredths dollars, with interest thereon from the date hereof at the rate of six per cent. per annum, together with the said plaintiff's costs herein, taxed at nineteen and ninety-six one-hundredths ($19.96) dollars, and that execution issue therefor. To

which judgment and every part thereof defendant at the time excepts, and its exception is allowed.

Done in open court this thirty-first day of December, 1898.

C. H. HANFORD, *Judge.*

(Endorsed:) Judgment. Filed Dec. 31, 1898, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

46 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,

vs.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Defendant in Error.

Assignment of Errors.

In the matter of the petition of The Mutual Life Insurance Company of New York, plaintiff in error.

Comes now the above-named plaintiff in error, The Mutual Life Insurance Company of New York, a corporation, on this twenty-fourth day of January, 1899, by its attorneys, Edward Lyman Short, Struve, Allen, Hughes & McMicken and Strudwick & Peters, and says that in the record and proceedings in the above-entitled action there is manifest error, of which it makes the following assignment of error, to wit:

I.

The circuit court of the United States for the district of Washington, northern division, erred in sustaining the demurrer of the plaintiff and defendant in error to the first affirmative answer and defense of defendant and plaintiff in error, The Mutual Life
47 Insurance Company of New York (a corporation), to the first cause of action in the complaint pleaded.

II.

The said circuit court erred in sustaining the demurrer of the said defendant in error and plaintiff to the second affirmative defense of said defendant and plaintiff in error to the first cause of action in said complaint pleaded.

III.

Said circuit court erred in sustaining the demurrer of the said plaintiff and defendant in error to the first affirmative defense of defendant and plaintiff in error to the second cause of action in the complaint set forth.

IV.

The said circuit court erred in sustaining the demurrer of the said plaintiff and defendant in error to the second affirmative answer and defense to the second cause of action in the complaint set forth

V.

The said circuit court erred in sustaining the demurrer of said plaintiff and defendant in error to the answer of the defendant and plaintiff in error.

VI.

The said circuit court erred in granting judgment in favor of the said plaintiff and defendant in error against the said defendant and plaintiff in error for the amount of said judgment, or any sum.

VII.

Because it is manifest upon the issues formed in said cause
48 that the said plaintiff was not entitled to judgment.

VIII.

The said court erred in not submitting said cause to trial upon the issues formed by the pleading.

Wherefore, the said plaintiff in error prays that the judgment of the said circuit court of the United States for the district of Washington, northern division, be reversed, and that the said circuit court of the United States be ordered to enter an order reversing and setting aside said judgment and granting a new trial in said cause.

EDWARD LYMAN SHORT,
STRUVE, ALLEN, HUGHES & McMICKEN, AND
STRUDWICK & PETERS,
Attorneys for Plaintiff in Error and Defendant.

Copy of foregoing assignment of errors received and service of same acknowledged this twenty-fourth day of January, 1899.

ALLEN & ALLEN,
Attorneys for Defendant in Error.

(Endorsed:) Assignment of error. Filed Jan. 24, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

49 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.
No. 654.

Petition for Order Allowing Writ of Error.

Petition for order allowing writ of error.

The said defendant, The Mutual Life Insurance Company of New York (a corporation), feeling itself aggrieved by the judgment entered in said cause on the thirty-first day of December, 1898, in favor

of said plaintiff and against said defendant, for the sum of $5,000.90, with interest thereon from the date of said judgment at the rate of six per cent. per annum together with said plaintiff's costs, taxed at nineteen and ninety-six one-hundredths dollars, and directing that execution issue therefor, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assignment of error which is filed herewith, comes and prays said court
50 for an order allowing the said defendant to prosecute a writ of error to the honorable United States circuit court of appeals for the ninth circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause be suspended and stayed until the determination of said writ of error by said circuit court of appeals for the ninth circuit. And further prays that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the circuit court of appeals, and your petitioner will ever pray.

Dated this twenty-fourth day of January, 1899.

EDWARD LYMAN SHORT,
STRUVE, ALLEN, HUGHES & McMICKEN, AND
STRUDWICK & PETERS,
Attorneys for the Defendant, The Mutual Life Insurance Company of New York, a Corporation.

A copy of foregoing petition received and service of same acknowledged this twenty-fourth day of January, 1899.

ALLEN & ALLEN,
Attorneys for Plaintiff.

(Endorsed:) Petition for order allowing writ of error. Filed Jan. 24, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

51 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Plaintiff,	
vs.	No. 654.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, (a Corporation), Defendant.	

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the court-room of said court in the city of Seattle, Wash., upon the petition of the defendant, The Mutual Life Insurance Company of New York (a corporation), herein filed, praying the allowance of a writ of error

to the United States circuit court of appeals for the ninth circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States circuit court of appeals for the ninth circuit, and that such other and further proceedings may be had as may be proper in the premises.

52 The court having duly considered the same, does hereby allow the said writ of error prayed for, and it is ordered that upon the giving by said defendant, The Mutual Life Insurance Company of New York (a corporation), of a bond according to law, in the sum of sixty-five hundred dollars, the same shall operate as a supersedeas bond and all proceedings be stayed, pending the determination of said writ of error.

Dated this twenty-fourth day of January, 1899.

C. H. HANFORD, *Judge.*

Copy of foregoing order received and service of same acknowledged this twenty-fourth day of January, 1899.

ALLEN & ALLEN,
Attorneys for Plaintiff.

(Endorsed:) Order granting writ of error and fixing amount of bond. Filed Jan. 24, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Plaintiff, *vs.* THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.	No. 654.

53 *Supersedeas Bond.*

Know all men by these presents, that we, The Mutual Life Insurance Company of a New York (a corporation), the above-named defendant, as principal, and E. C. Neufelder and L. Turner, of King county, Washington, as sureties, are held and firmly bound unto Walter B. Allen, as administrator of the estate of Samuel B. Stewart (deceased), the above named plaintiff, in the sum of six thousand five hundred dollars, to be paid to said plaintiff, his executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this twenty-fourth day of January, 1899.

The condition of the above obligation is such that whereas in the above court and cause, final judgment was rendered against the

said defendant and in favor of said plaintiff, in the sum of five thousand and ninety one-hundredths dollars, with interest and costs; and

Whereas, the said defendant has obtained from said court a writ of error to reverse the judgment in said action, and a citation directed to the plaintiff is about to be issued, citing and admonishing him to be and appear in the United States circuit court of appeals for the ninth circuit, to be held at San Francisco, in the State of California:

Now, therefore, if the said defendant, The Mutual Life In-
54 surance Company (a corporation), of New York, shall prosecute the said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation is to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK, [SEAL.]
By SHERWOOD GILLESPY,
Its General Agent for the State of Washington,
And by STRUVE, ALLEN, HUGHES & McMICKEN,
Its Attorneys.
E. C. NEUFELDER. [SEAL.]
L. TURNER. [SEAL.]

[50-ct. revenue stamp affixed and canceled.]

UNITED STATES OF AMERICA,
District of Washington, Northern Division, King County, } *ss:*

E. C. Neufelder and L. Turner, sureties on the foregoing bond, being each duly sworn, each for himself deposes and says: That he is a freeholder in said district, and that he, the said E. C. Neufelder, is worth the sum of six thousand five hundred dollars; that he, the said L. Turner, is worth the sum of six thousand five hundred dollars; and in each case exclusive of property exempt from execution, and over and above all debts and liabilities.

E. C. NEUFELDER.
L. TURNER.

55 Subscribed and sworn to before me this twenty-fourth day of January, one thousand eight hundred and ninety-five.

JAMES KIEFER,
United States Commissioner.

[Seal of U. S. Com'r.]

[10c. revenue stamp affixed and canceled.]

The sufficiency of the sureties of the foregoing bond approved by me this twenty-fourth day of January, 1899.

C. H. HANFORD,
Judge of said Court.

Copy of foregoing bond received and service of same acknowledged this twenty-fourth day of January, 1899.

ALLEN & ALLEN,
Attorneys for Plaintiff.

(Endorsed:) Supersedeas bond. Filed Jan. 24, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

Writ of Error (Copy).

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, northern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between Walter B. Allen, as administrator of the estate of Samuel B. Stewart, deceased, and The Mutual
56 Life Insurance Company of New York, defendant, a manifest error hath happened to the great damage of the said The Mutual Life Insurance Company of New York (a corporation), defendant, as is said and appears by the complaint; we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf do command you, if any judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the twenty-first day of February, 1899, that the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By H. M. WALTHEW, *Deputy.*

[Seal U. S. Circuit Ct.]

57 The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

[Seal U. S. Circuit Ct.]

Received this twenty-fourth day of January, 1899, a true copy of the foregoing writ of error, for defendant in error, Walter B. Allen, as administrator of the estate of Samuel B. Stewart (deceased).

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington, Northern Division.
By H. M. WALTHEW, *Deputy.*

[Seal U. S. Circuit Ct.]

(Endorsed:) Writ of error. Filed Jan. 24, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

Citation (Copy).

UNITED STATES OF AMERICA, *ss:*

To Walter B. Allen, as administrator of the estate of Samuel B. Stewart, deceased, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, State of California, on the twenty-first day of February, 1899, pursuant to a writ of error
58 filed in the clerk's office of the circuit court of the United States for the district of the State of Washington, northern division, wherein The Mutual Life Insurance Company of New York (a corporation) is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the twenty-fourth day of January, 1899.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

[Seal U. S. Circuit Ct.]

Attest: A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By H. M. WALTHEW, *Deputy.*

We hereby, this twenty-fourth day of January, 1899, acknowledge service of the foregoing citation at Seattle, Washington.

ALLEN & ALLEN,
Counsel for Walter B. Allen, as Administrator of the Estate of Samuel B. Stewart, Deceased.

(Endorsed:) Citation. Filed Jan. 24, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

59 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW York (a Corporation), Defendant. } No. 639.

Præcipe for Record.

To the clerk of the above-named court:

In your return to the writ of error issued out of the circuit court of appeals for the ninth circuit, to the above-named circuit court of the United States, you will please include the following:

(1.) Complaint, filed December 28, 1897.

(2.) Præcipe for appearance of attorneys for plaintiff, filed December 28, 1897.

(3.) Præcipe for appearance of attorneys for defendant, filed January 29, 1898.

(4.) Answer, filed January 29, 1898.

(5.) Demurrer to respective first affirmative defenses in answer, filed February 9, 1898.

(6.) Opinion on demurrer, filed May 28, 1898.

(7.) Demurrer to respective second affirmative defenses in answer, filed December 22, 1898.

60 (8.) Judgment, filed December 31, 1898.

(9.) Assignment of errors, filed January 24, 1899.

(10.) Petition for writ of error, filed January 24, 1899.

(11.) Order fixing amount of supersedeas bond, filed January 24, 1899.

(12.) Supersedeas bond, filed January 24, 1899.

(13.) Writ of error, filed January 24, 1899.

(14.) Copy of writ of error lodged with clerk for defendant in error, filed January 24, 1899.

(15.) Citation, with acknowledgment of service, filed January 24, 1899.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

(Endorsed:) Præcipe for record. Filed in the United States circuit court, district of Washington, Feb. 15, 1899. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.
No. 654.

61 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *District of Washington*, } *ss:*

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify that the foregoing fifty-one (51) typewritten pages, numbered from one (1) to fifty-one (51), both inclusive, constitute and are a complete, true, and correct copy of the record, papers and all proceedings had in the foregoing-entitled cause as the same remains of record and on file in the office of said circuit court, and that the same, which I transmit, constitutes my return to the annexed writ of error lodged and filed in my office on the twenty-fourth day of January, 1899. I also hereto annex and herewith transmit the original citation in said cause.

I further certify that no other opinion of the court than the one hereinbefore set forth was rendered or filed in said cause.

I further certify that the costs of preparing and certifying the foregoing transcript of record and return is the sum of $15.65, and that the same has been paid me in full by Struve, Allen, Hughes & McMicken, attorneys for the plaintiff in error.

62 In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court this seventeenth day of February, 1899.

A. REEVES AYRES,
Clerk of the United States Circuit Court of the District of Washington, Ninth Circuit,
[SEAL.] By R. M. HOPKINS, *Deputy Clerk.*

[Cancelled 10-c. int. rev. stamp.]

Writ of Error (Original).

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, northern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between Walter B. Allen, as administrator of the estate of Samuel B. Stewart, deceased, and The Mutual Life In-

surance Company of New York, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York (a corporation), defendant, as is said and appears by the complaint; we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if any judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings
63 aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the twenty first day of February, 1899.

That the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,
By H. M. WALTHEW, *Deputy.*

[SEAL.]

The foregoing writ is hereby allowed.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

[SEAL.]

64 Received this twenty-fourth day of January, 1899, a true copy of the foregoing writ of error, for defendant in error, Walter B. Allen, as administrator of the estate of Samuel B. Stewart, deceased.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington, Northern Division,
By H. M. WALTHEW, *Deputy.*

[SEAL.]

(Endorsed:) Original. No. —. In the United States circuit court of appeals, ninth circuit. The Mutual Life Insurance Company of New York (a corporation), plaintiff in error, *vs.* Walter B. Allen, as administrator, etc., defendant in error. Writ of error. Filed Jan. 24, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

Citation (Original).

UNITED STATES OF AMERICA, *ss:*

To Walter B. Allen, as administrator of the estate of Samuel B. Stewart (deceased), Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, State of California, on the twenty-first day of February, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States
65 for the district of the State of Washington, northern division, wherein The Mutual Life Insurance Company of New York (a corporation), is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the twenty-fourth day of January, 1899.

C. H. HANFORD,
United States District Judge for the District of Washington, Sitting as Judge of said Circuit Court of the United States for the Ninth Circuit, District of Washington.

Attest:
[SEAL.] A. REEVES AYRES,
Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington.
By H. M. WALTHEW, *Deputy.*

We hereby this twenty-fourth day of January, 1899, acknowledge service of the foregoing citation at Seattle, Washington.

ALLEN & ALLEN,
Counsel for Walter B. Allen, as Administrator of the Estate of Samuel B. Stewart, Deceased.

(Endorsed:) Original. No. —. In the United States circuit court of appeals, ninth circuit. The Mutual Life Insurance Company of New York (a corporation), plaintiff in error, *vs.* Walter B.
66 Allen, as administrator, etc., defendant in error. Citation. Filed Jan. 24, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

(Endorsed:) No. 519, in the United States circuit court of appeals for the ninth circuit. Mutual Life Insurance Company of New York (a corporation), plaintiff in error, *vs.* Walter B. Allen, as administrator of the estate of Samuel B. Stewart (deceased), defendant in error. In error to the circuit court of the United States for the district of Washington, northern division. Transcript of record. Filed February 20, 1899. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

67 THE MUTUAL LIFE INSURANCE COMPANY OF NEW York (a Corporation) vs. WALTER B. ALLEN, as Administrator, etc. } No. 519.

Order of Submission.

By stipulation of counsel, ordered cause submitted to the court for consideration and decision on briefs.

In the United States Circuit Court of Appeals, Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error, vs. WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Defendant in Error. } No. 519.

Opinion U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of Washington, northern division.

Edward Lyman Short, John B. Allen and R. C. Strudwick, for plaintiff in error; Struve, Allen, Hughes & McMicken, and Strudwick & Peters, of counsel.

Allen & Allen, for defendant in error.

68 Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

This is an action brought upon two policies of insurance on the life of Samuel B. Stewart, each for the sum of $2,500. One premium was paid on each policy when delivered. No other premiums were ever paid. The pleadings in this case, as to forfeiture, are similar to the case of The Mutual Life Insurance Company *v.* Sears, *ante*. The court sustained a demurrer to the answer and rendered judgment in favor of defendant in error for $5,091, with interest and costs. Upon the legal principles announced in The Mutual Life Insurance Company *v.* Hill, *ante*, and authorities there cited, the judgment of the circuit court is affirmed, with costs.

(Endorsed:) Opinion. Filed October 2, 1899. F. D. Monckton, clerk.

69 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,
vs.
WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Defendant in Error.
No. 519.

Judgment U. S. Circuit Court of Appeals.

In error to the circuit court of the United States for the district of Washington, northern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, northern division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed Oct. 2, 1899. F. D. Monckton, clerk.

70 At a stated term, to wit, the October term, A. D. 1899, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the ninth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation)
vs.
WALTER B. ALLEN, as Administrator, etc.
No. 519.

Order Staying Mandate.

Upon motion of Warren Gregory, Esquire, ordered mandate herein stayed until the further order of the court.

71 United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,
vs.
WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Defendant in Error. } No. 519.

Clerk's Certificate to Transcript, United States Circuit Court of Appeals.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing seventy (70) pages, numbered from one (1) to seventy (70), inclusive, to be a full, true and correct copy of the transcript of the record, the order of submission, the opinion, the judgment, and the order staying mandate in the above-entitled cause, as the originals thereof remain and appear of record in my office, and that the same together constitutes a copy of the entire record of the case in said United States circuit court of appeals for the ninth circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this fourteenth day of October, A. D. 1899.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Oct. 14, '99. F. D. M.]

72 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error and Walter B. Allen, as administrator of the estate of Samuel B. Stewart, deceased, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of February, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 455, October term, 1899. The Mutual Life Ins. Co. of New York *vs.* Walter B. Allen, adm'r, &c. Writ of certiorari. Filed Feb. 15, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY, Petitioner and Plaintiff in Error,
vs.
WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased. } No. 519.

Stipulation as to Return to the Writ of Certiorari.

It is, this 17th day of February, A. D. 1900, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause, heretofore submitted to the Supreme Court of the United States with the petition for a writ of certiorari, may be filed in the said Supreme Court, and may be received and considered by that court as the transcript of the record in said cause as though the same had been

returned by the clerk of the circuit court of appeals for the ninth circuit in obedience to the writ of certiorari granted February 6th, 1900.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Petitioner and Plaintiff in Error.
JOHN H. ALLEN,
JAY C. ALLEN,
ALLEN & ALLEN,
Attorneys for Respondent and Defendant in Error.

(Endorsed:) Stipulation as to return to writ of certiorari. Filed Feb. 20, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a full, true, and correct copy of a stipulation entered into between the respective counsel, filed in the cause entitled The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *v.* Walter B. Allen, as administrator, etc., defendant in error, No. 519, as the original thereof remains of record in my office.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Plaintiff in Error,
v.
WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, Deceased, Defendant in Error.
No. 519.

Return to Writ of Certiorari.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari, issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above-

entitled cause, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 17th day of February, 1900, the original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

[Endorsed:] Case No. 17,569. Supreme Court U. S., October term, 1899. Term No., 455. The Mutual Life Ins. Co. of New York *vs.* Walter B. Allen, adm'r, &c. Writ of certiorari & return thereto. Office Supreme Court U. S. Filed Mar. 10, 1900. James H. McKenney, clerk.

NOV 29 19

No. 453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

RE PARCE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Plaintiff in Error, vs. WALTER B. ALLEN as Administrator of the Estate of Samuel B. Stewart, Deceased, Defendant in Error.

PETITION FOR WRIT OF CERTIORARI.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PETITIONER.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR, vs. WALTER B. ALLEN, AS ADMINISTRATOR OF THE ESTATE OF SAMUEL B. STEWART, DECEASED, DEFENDANT IN ERROR.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

The PETITION of the MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, respectfully shows to this Honorable Court as follows:

I.

That your petitioner is a mutual insurance company, chartered and created under and by virtue of an act of the Legislature of the State of New York, of April 12th, 1842, entitled, "An act to incorporate The Mutual Life Insurance Company of New York," and a citizen of said State, with its principal office in the City of New York. That Section 92 of Chapter 690 of the laws of the State of New York of 1892 is as follows:

"No Forfeiture of Policy without notice. No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to a duly-appointed agent or person au-

thorized to collect such premium by or before the day when it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited, or declared forfeited, or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, and the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." This section was amended by Chapter 218, Laws 1897, by adding the following: "No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued"

That in an act of the Legislature of the State of Washington, entitled "An act relating to foreign corporations, and to repeal certain laws in connection therewith," approved March 28th, 1890, the following provisions are contained:

"Section 1. That any corporation incorporated under the laws of any State or Territory in the United States, or of any foreign country, State or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this State, shall have full power, and is hereby authorized to sue and to be sued in

any court having competent jurisdiction; to acquire, purchase, hold, mortgage, sell, convey or otherwise dispose of in the corporate name all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate by mortgage or otherwise due to, or loans made by such foreign corporations within the boundaries of this State, either prior to or after the passage of this act, and generally to do and perform every act and transact every kind of business within this State, in the same manner and to the same extent as corporations incorporated and organized under the laws of this State are authorized to do under the laws of this State, by a compliance with all the conditions prescribed by the second and third sections of this act."

That prior to the 18th day of February, 1893, your petitioner was transacting an insurance business in the State of Washington, and in compliance with the terms and requirements of said statute, filed and recorded in the office of the Secretary of said State, a certified copy of its charter; it also constituted and appointed F. L. Stinson, residing at Seattle, its agent, that being the place where the principal business of your petitioner was carried on in the State.

II.

Your petitioner states that prior to February 18th, 1893, and until his death on July 9th, 1897, one Samuel B. Stewart resided at Seattle and was a cititzen of the State of Washington. That about the 1st of February, 1893, the said Stewart made the usual application in writing for two policies upon his life, in the sum of twenty-five hundred dollars each, to your petitioner. That the application contained the following provisions:

"This application is made to The Mutual Life Insurance Company of New York, subject to the charter of the Company and the laws of the State of New York," and the further provision and condition that the policies to be issued pursuant to the application "shall not take effect until the first premiums shall have been paid and the policies shall have been delivered during my continuance in good health." That after signing the application, said Stewart delivered it at Seattle to the agent of your petitioner, who transmitted it by mail to the principal office of your petitioner on the Pacific Coast at San Francisco, from whence it was mailed to your petitioner at New York City, and your petitioner executed its two policies of life insurance to said Samuel B. Stewart upon his life, in the sum of twenty-five hundred dollars each, and caused the same to be mailed to the said agent at San Francisco, who transmitted them by mail to your petitioner's agent at Seattle, Washington, and that at Seattle, on the 18th day of February, 1893, or shortly thereafter, in exchange for the first annual premium on each policy there paid to your petitioner, it delivered the said policies to the insured.

The following, excepting the provisions of the contracts not affecting this case, is substantially a copy of one of said policies:

"In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the City of New York, unto Samuel B. Stewart, of Seattle, in the County of King, State of Washington, his executors, administrators, or assigns, twenty-five hundred dollars, upon acceptance of satisfactory proofs at its home office of the death of said Samuel B. Stewart during the continuance of this policy, upon the

following conditions, and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made a part hereof:

"Annual premium, $47.75.

"The annual premium of forty-seven dollars and seventy-five cents shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the City of New York, on the eighteenth day of February in every year during the continuance of this contract.

"In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary at its office in the City of New York, the eighteenth day of February, A. D. one thousand eight hundred and ninety-three.

"RICHARD MCCURDY,
"President.

"C. F. SCHRODER,
"Assistant Secretary.

The receipt of the first payment of premium hereon is acknowledged.

W. J. EASTON,
Secretary.

"Provisions, Requirements and Benefits.

"Payment of Premiums.—Each premium is due and payable at the home office of the company in the City of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

That no premium, nor any part of a premium, subsequent to the first, has ever been paid, although the insured knew of the amounts of the premiums and when due, and that your petitioner had, after default in the payment of the second premium, declared the policies forfeited and lapsed, and so entered them upon its books, and so treated them during the life of the insured.

III.

Your petitioner further states that after the death of said Samuel B. Stewart, Walter B. Allen was appointed the administrator of his estate and qualified and entered upon his duties as such, August 28th, 1897, at Seattle.

IV.

Your petitioner further states that on December 28, 1897, the administrator brought suit against your petitioner to recover five thousand dollars, the amount of said policies, with interest, in the United States Circuit Court for the District of Washington, Northern Division, in his complaint setting forth the respective policies and alleging compliance with their terms on the part of the insured during his lifetime and the administrator subsequently. Your petitioner, in its answer, admitted the execution and delivery of the policies, but denied they were entered into in the State of New York, and controverted compliance with the terms of the policies on the part of the insured or the administrator, and asserted as a defense (the defense to each cause of action being separate) that no premium had ever been paid upon either policy, except the first annual premiums paid at the time of their delivery, alleged the contracts were entered into in the State of Washington and

under its laws, and that Samuel B. Stewart had neglected and refused to pay the premiums falling due on the said policies February 18th, 1894, or any part of either, and further alleged that no premium had been paid or anything on account thereof, save the first annual premium on each policy. And as a further defense, your petitioner alleged the payment of the first annual premium on each of the policies at Seattle, Washington, and at the same time the delivery there by your petitioner of the policies of insurance in exchange for such premiums; and further alleged that it was provided in each of said policies that "an annual premium of sixty-six dollars and fifty cents ($66.50) shall be paid in advance on the delivery of said policy and thereafter on the eighteenth day of February in every year during the continuance of said contract or policy of insurance," and that it was also provided in the policies as one of the conditions thereof, as follows:

"Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

That the said Samuel B. Stewart had never paid nor offered to pay the premiums falling due February 18th, 1894, and that he was at all times advised and informed that default had been made in each and every premium from the first down to the time of his death in 1897. That your petitioner had entered and noted the policies upon its books as forfeited and lapsed for failure to pay the an-

nual premiums falling due February 18th, 1894, and the insured was advised that your petitioner had so treated the policies, and consented to their forfeiture, and determination, and with this mutual knowledge and understanding between the parties the policies were, after February 18th, 1894, deemed lapsed and terminated; and relying upon such knowledge and understanding, your petitioner never subsequently mailed or served any notice of the due date of premiums upon the said Stewart during his lifetime, knowing that said Stewart was treating the policies as forfeited, and that in view of the said premises, the parties mutually agreed and consented to the lapsing and determination of the policies from and after February 18th, 1894. Your petitioner states that defendant demurred to the answer and to each of the separate defenses, and the demurrer was sustained by the Circuit Court, to which rulings of the Court your petitioner duly excepted. And your petitioner electing to stand upon its said answer, the said defendant in error moved the Court for judgment according to the prayer of his complaint, against the objection and protest of your petitioner, notwithstanding which the said Circuit Court rendered its judgment against your petitioner in the sum of five thousand and ninety one-hundredths dollars, with interest and costs. That your petitioner feeling aggrieved by the judgment of said Circuit Court, applied to the Circuit Court of Appeals for the Ninth Circuit, for a writ of error for the correction of the manifest errors that happened to the damage of your petitioner as shown by the record and proceedings, as well as in the judgment of said cause, and a writ of error was issued out of said Circuit Court of Appeals, and upon the return of such writ the said cause was argued before said Circuit Court of Appeals, and thereafter and

on the 2nd day of October, 1899, the said Circuit Court of Appeals affirmed the judgment of the said Circuit Court.

V.

Your petitioner states that upon the face of the record of said cause as the same is on file and was presented in said Circuit Court of Appeals, and by the assignment of errors made and presented by your petitioner in said Circuit Court of Appeals, the following questions were and are in issue and involved in the adjudication of said case :

FIRST.

Whether the contracts of life insurance upon which the action was brought, are contracts entered into and governed by the laws of the State of Washington or the laws of the State of New York, and whether said statutes of the State of New York of 1892, requiring notice to be given as therein prescribed, applies to this case or at all in the State of Washington.

SECOND.

Whether actual notice possessed and acted upon by the insured at the time the premiums fell due obviated the necessity of the statutory notice prescribed by the statute of New York, the insured at the time residing in the State of Washington.

THIRD.

Whether, if such statute does apply, the parties could and did waive the notice therein prescribed.

FOURTH.

Whether it was competent for the Legislature of the State of New York, under the said general statute of 1892, to alter and amend the charter of your petitioner, and if so, whether your petitioner, being a corporation created and chartered under a special act of the Legislature of New York, was intended to be included in or affected by said general act.

FIFTH.

Whether it was the meaning of the Legislature of New York that the act of 1892 should apply to a transaction taking place in the State of Washington, as disclosed by the record in this case, and whether said statute follows your petitioner beyond the limits of New York as a part of its charter, or whether the same is operative only within that State upon corporate business there transacted.

SIXTH.

Whether the public policy of freedom of contract conferred by its Legislature upon foreign corporations transacting business in the State of Washington, should be a controlling reason for determining the contract a Washington contract not affected by the statute of New York.

SEVENTH.

If it should be held that the general statute of New York of 1892, respecting premium notices, ap-

plies to this case, whether failure to give the notice prescribed by the statute can operate to render your petitioner liable for a greater measure of insurance than the amount of the premium paid will purchase.

EIGHTH.

Whether the failure to give notice of a particular premium maturing will have the effect of keeping the policy alive, notwithstanding subsequent premiums have been knowingly left unpaid.

NINTH.

Whether, although your petitioner failed to give the notice prescribed by the statute of New York, and the premiums due on each succeeding year prior to the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property without consideration, to require your petitioner in case of the death of the insured, to pay the policy.

TENTH.

In the event that the statute of New York should be held to apply to this case, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

ELEVENTH.

Whether, in the event it is held that the statute of

New York applies to this case, it is a statute relieving the insured from the consequences of a breach of his contract, or whether it enters into the being and charter of your petitioner, and becomes a limit upon its powers of contracting outside of the State of New York.

TWELFTH.

Whether defendant in error, not having begun his action until the 28th day of December, 1897, can, in any event, avail himself of the New York statute, the amendment of which of April —, 1897, is as follows:

"No action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof, for which it is claimed that a forfeiture ensued."

THIRTEENTH.

Whether it is not a fatal departure from law to law for plaintiff, alleging as his cause of action a policy of insurance, and compliance with its terms, and admitting the defense of non-payment of premiums, to recover judgment because the defendant has failed to show compliance with the unpleaded statute of New York in regard to mailing notice of the due date of premium.

FOURTEENTH.

Whether under the charter of the defendant Company and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the Company.

VI.

Your petitioner states that it has issued and now has outstanding in different states and territories of the Union, many life insurance policies, and has entered into such contracts with large numbers of the residents and citizens of the state of Washington, and other corporations created and organized under the laws of the state of Washington have entered into and now have outstanding large numbers of similar policies in such states and territories. That at the time of rendering its opinion in this case, the honorable Circuit Court of Appeals rendered a similar opinion and upon substantially the same questions in three other cases wherein your petitioner is plaintiff in error, and that another case in which your petitioner is plaintiff in error has been submitted to the Circuit Court of Appeals, involving the same questions, and a number of like cases are now pending for decision in the United States Circuit Court for the District of Washington. That in view of the large amount involved in such litigations, and in view of the difference in judicial opinions respecting the number of questions involved, your petitioner represents that the gravity of the matters in this case is such that they should be authoritatively and finally adjudicated by this Honorable Court upon a full and fair presentation of the merits of the case (or such of them as the Court may direct) upon the part of your petitioner and the said defendant in error Walter B. Allen as administrator of the estate of Samuel B. Stewart, deceased.

That the Phinney case (No. 12 on the calendar) this Court involves questions under kindred Statutes.

VII.

Your petitioner states that a certified copy of the entire record in said cause in said Circuit Court of Appeals is herewith furnished and hereto annexed as a part of this application, in conformiiy with Rule 37 of this Honorable Court relating to cases in the Circuit Court of Appeals, and the same is marked "Exhibit A."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of the Honorable Court, directed to the United States Court of Appeals for the Ninth Circuit, certifying the said court to certify and send to this court, on a certain day to be therein designated, a full and complete transcript of the record and all proceedings in the said Circuit Court of Appeals in said cause therein entitled "The Mutual Life Insurance Company of New York, a Corporation, Plaintiff in Error, vs. Walter B. Allen, as Administrator of the Estate of Samuel B. Stewart, Deceased, Defendant in Error," No. 519, to the end that the said cause may be reviewed and determined by this Court as provided by section six of an Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3rd, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity to said act, and that the said judgment of the said Circuit Court of Appeals in said case, and every part thereof may be reversed by this Honorable Court.

And yonr petitioner will ever pray.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
ROBERT C. STRUDWICK,
Attorneys and Counsel for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, } ss.
COUNTY OF NEW YORK. }

EDWARD LYMAN SHORT being duly sworn, says: That he is one of the attorneys and of counsel for The Mutual Life Insurance Company of New York, the petitioner above named, and as such has had personal charge for it of the case in the foregoing petition named in the Circuit Court of Appeals for the Ninth Circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

EDWARD LYMAN SHORT.

Subscribed and sworn to before me this 18th day of November, 1899.

ALFRED MACKAY,
[SEAL.] Notary Public,
New York County.

No. 766. 3x42. 95. 12.
Brief of Sewell, Short & Allen
for Petitioner
Filed Apr. 9, 1897.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. NELLIE PHINNEY, Executrix of the Last Will and Testament of Guy C. Phinney, Deceased, Defendant in Error, or, as an alternative relief, that said Circuit Court of Appeals be required to reinstate and proceed to try and adjudge said case according to law and the right thereof.

BRIEF OF PETITIONER.

ROBERT SEWELL,
E. LYMAN SHORT,
JOHN B. ALLEN,
Attorneys for Petitioner.

PUGET SOUND STATIONERY & PRINTING CO., SEATTLE.

IN THE

SUPREME COURT OF THE UNITED STATES

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BRIEF OF PETITIONER.

STATEMENT.

The Mutual Life Insurance Company of New York, a corporation chartered as such by a special act of the Legislature of the state of New York, in September, 1890, insured the life of Guy C. Phinney for one hundred thousand dollars for the term of twenty years. At the time of taking the insurance, Phinney was a citizen and resident of the city of Seattle, state of Washington. The insurance company had complied with the laws of that state requiring foreign corporations transacting business therein to file with the Secretary of State a copy of its articles and to appoint an agent at the principal place of

business of the company in the state. This statutory agent was also the general agent of the insurance company in the state and was engaged in procuring insurance for the company. The insurance company also had a general office at San Francisco for the conduct and management of its business affairs on the Pacific Slope. The application for insurance and the physical examination of the applicant were made at Seattle. The application was delivered to the agent of the company there and he transmitted the same to the general agent at San Francisco, who forwarded it to the principal office of the company in New York City, and in due course the policy of insurance was transmitted by mail to the San Francisco agent and by him to the agent at Seattle, who there delivered it to Phinney upon receipt of the first annual premium of $3,770.

The laws of the state of Washington confer upon foreign corporations authority "to do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state." (*See Petition p. 3.*)

The application for insurance and the endorsements upon the policy were made a part of the contract. In the application it was provided that the policy "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health;" and also that "This application is made to The Mutual Life Insurance Company of New York subject to the charter of the company and the laws of the state of New York." Among the endorsements on the policy is the following: "Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere

when taken in exchange for the company's receipt, signed by the President or Secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived. * * * This policy shall become void by the non-payment of premium."

Shortly before the annual premium succeeding that paid upon the delivery of the policy became due, the company's receipt, duly signed by its President, was transmitted to the agent of the company at Seattle to be exchanged for the premium becoming due and payable. The insured was informed of the fact, and conferred with the agent respecting it, and expressed his inability to make payment; and some weeks following the due date of the premium, the receipt was returned to the home office on account of its non-payment, and the policy was entered upon the books of the company as forfeited. Neither payment nor tender of payment was ever made of any premium save that paid upon the delivery of the policy in September, 1890. On the 12th day of September, 1893, Phinney died, at Seattle. Shortly after the forfeiture of the policy, the insured gave it to the agent of the insurance company, as claimed by the latter because it was a forfeited policy, but by the defendant in error as a loan.

Upon the qualification of the defendant in error as the executrix of her deceased husband's will, she caused an inventory of the estate to be filed for appraisement, including therein another life insurance policy, but made no inquiry concerning the one in dispute until nearly a year afterward. Upon making claim for the insurance and offering proof of the death of the insured, and being advised by the insurance company that the policy had been forfeited for non-payment of premium, this action was brought by the executrix.

The complaint set up the policy of insurance, including the application and endorsements upon it, which were made a part of the policy. Performance by the insured of all the conditions of the contract was averred but controverted by the defendant company.

The statute of New York quoted in the Petition provides that "no life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of the non-payment of any annual premium or interest or any portion thereof excepting as hereinafter provided." The amendment of said statute provided that the affidavit of anyone authorized to mail the notice that the same was duly addressed to the person whose life was insured should be presumptive evidence of the notice having been given.

The Circuit Court instructed the jury that there was no evidence to warrant a finding that more than the first premium had been paid, but there was positive evidence that no further payment had been made of such significance as to cause him to take that question from the jury. The jury were instructed, however, that the policy was a New York contract, dominated and controlled by the laws of that state, and that unless notice had been given in strict compliance with the laws of the state of New York the policy remained alive, regardless of non-payment of premiums, and that tender of delinquent and unpaid premiums was not required before the commencement of action nor need such tender be made upon the trial. The jury were further instructed that from the verdict, if found in favor of the executrix, they could deduct the amount of such premiums. The verdict went against the insurance company and judgment was rendered for $97,012.84.

A writ of error was sued out from the Circuit Court of Ap-

peals of the Ninth Circuit, and lodged with the clerk of the Circuit Court, who, upon his fees in the amount of $211 being paid, transmitted a full and complete transcript of the record, annexed to the writ, to the office of the clerk of the Circuit Court of Appeals, agreeably to its mandate.

Following the issuance of the writ from the Circuit Court of Appeals, and on the same day, a citation was issued out of the Circuit Court of Appeals, service of which was admitted as follows: "Service of the within citation and the receipt of a copy thereof admitted this 14th day of December, A. D. 1895, S. Warburton, A. F. Burleigh, attorneys and counsel for Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased."

The petitioner, desiring a supersedeas, on the same day lodged with the clerk of the Circuit Court a copy of the writ upon which the following endorsement was made: "Received a true copy of the foregoing writ of error for defendant in error. Dated this 14th day of December, 1895, A. Reeves Ayres, Clerk U. S. Circuit Court for the Ninth Circuit, District of Washington, by R. M. Hopkins, Deputy Clerk."

Rule 14 of the U. S. Circuit Court of Appeals prescribes the duty of the clerk in making return to a writ of error as follows:

"1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

"2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of

error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid."

Both these provisions of the rule were complied with by the clerk of the Circuit Court. He did not, however, place upon the writ of error a written endorsement of the filing thereof. A motion to dismiss the writ of error was made in the Circuit Court of Appeals which upon the following ground was sustained. "2. Said writ of error was not filed in the court below."

Before the hearing of the motion to dismiss, an affidavit of the clerk of the Circuit Court was filed in the Circuit Court of Appeals, stating that the writ of error had, during usual business hours, been brought to his office by the attorney of the petitioner and delivered to him with the request that it be filed and its mandate obeyed; that he had obeyed its mandate, as he understood it, by making a return in conformity to the rule of the Circuit Court of Appeals; that it had been the uniform rule from the organization of the court to make no endorsement of filing upon a writ of error issuing out of the appellate court; and that, if permitted, he would make written endorsement of filing upon it as of the date he received it. Counsel for petitioner confirmed by affidavit the statement of the clerk. All fees were paid by the petitioner and the record was lodged in the office of the Circuit Court of Appeals within the statutory time. The Circuit Court of Appeals dismissed the writ of error because it had not been filed by the clerk of the Circuit Court. The court was divided in opinion, Judge Gilbert writing a dissenting opinion. Petition for rehearing agreeably to the rules of the Circuit Court of Appeals was filed. The same was overruled without written opinion.

Upon the foregoing abbreviated statement of facts, which

are more fully set forth in the petition for certiorari or alternative relief, the petitioner asks this court to grant a writ of certiorari or afford such alternative relief as may be appropriate.

ARGUMENT.

Recognizing that the authority conferred by Sec. 6 of the Act of March 3, 1891 (*26 Stats. at Large, 826*), upon this court for requiring the record and cause to be sent up to it for its consideration is exercised sparingly and with caution, only in cases of gravity and general interest or in order to secure uniformity of decision, we offer the following reasons why the writ of certiorari, or other appropriate relief, should be afforded in this case.

Primarily, we present the question of jurisdiction. A case involving, as this does, a large amount of money, many complicated and some unsettled legal questions, is one of gravity and more than individual interest. When, however, in such a case, appeal is denied without fault of the party seeking it, the case assumes peculiar gravity, and comes within the category of cases this court should entertain both for the purpose of protecting the right of appeal and securing a uniformity of practice and decision. The petitioner did all the law required of it by lodging the writ of error with the clerk of the Circuit Court, requesting its filing, making payment of all fees and charges as estimated by the clerk, requesting the clerk to obey the mandate of the writ, and receiving the consent of that officer to do so.

DOES THE WRITTEN ENDORSEMENT BY THE CLERK UPON THE WRIT CONSTITUTE THE FILING CONTEMPLATED BY LAW, OR IS SUCH WRITING INDISPENSABLE TO THE JURISDICTION OF THE APPELLATE COURT?

Was it intended that the Federal appellate courts should be without jurisdiction, and appealing parties remediless, if a clerk of a Circuit Court, though having correctly performed every duty required of him by the mandate of a writ of error, through ignorance, mistake or inadvertence fails to place the file mark upon it?

On the contrary, we respectfully submit that the lodging of the writ of error with the clerk for the purpose of the return constitutes the filing contemplated by law. When the writ of error is placed in the custody of the clerk of the Circuit Court at his office during usual office hours, and he is requested to make return and accepts his fees from the appealing party for that purpose, such writ is filed in the clerk's office. An endorsement of filing affords the usual and convenient proof of what has been done, but it does not constitute the filing nor does it afford the only proof thereof.

"Careful practice would require that the clerk receiving the papers should endorse upon them the date of the filing; but such endorsement is not the filing, it is simply evidence of such filing. A paper is filed when it is delivered to the proper officer, and by him received to be kept on file."

Powers v. State, 87 Indiana, 144-148.

"We think that a certificate of the clerk, entered upon the brief at the time it is filed, is the best evidence of such filing, but that it is not necessary to the act of filing. 'A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file.' 13 Vin. Abr. 211; 1 Bouv. Law Dict. 568. The written memorandum of the clerk is but the

evidence of the delivery to him of the paper intended to be filed. In its absence, other testimony may properly be admitted to show that such paper was filed."

Peterson v. Taylor, 15 Georgia Rep., 483, (60 Am. Dec., 706.)

"All the party can do in order to have his deed filed, is to take it to the officer, and deliver it to the recorder. When he has done this, he cannot be charged with any default or negligence. The deed is then, in contemplation of law, filed for record."

Cook v. Hall, 1 Gilman, (Ill.), 575, 579.

"Filing a paper, * * * * means placing and leaving it among the files. The memorandum endorsed by the officer in whose custody it is placed, is merely evidence of the filing, and not the filing itself."

1 Bradwell, (Ill.), 145.

See *Dissenting Opinion* of Judge Gilbert, Circuit Judge (*Record, p. 446*), in harmony with the foregoing authorities, clearly demonstrating that the writ of error had been duly filed and the Circuit Court of Appeals was possessed of jurisdiction of the case.

In the recent case of *Wheeling Pottery Company v. Levi, 19 Southern Reporter, 752, (48 La.)*, it is said:

"The filing (of the petition) was overlooked by the clerk. It was handed to him in his office to be filed. It was received by him, acted upon, and was to be kept on file, and it was a document of his office. Having been placed by the attorney in the hands of the filing officer in his office, to be filed, and it having been acted upon, as already stated, and the contemporaneous facts rendering it evident that all was done in the utmost good faith, and that the omission was owing to a mere inadvertence of the officer, we think that the plaintiffs complied with the law to every intent and purpose. The absence of the 'file mark,' under the circumstances, cannot operate to his

prejudice. 'Filed' is the best evidence that the document is of record, but it is not always and under all circumstances the only evidence that will prove that a petition is of record, when, owing to clerical error, it is not expressly indorsed."

We make the following quotations from opinions of courts upon the same subject:

"But where the law requires or authorizes a party to file it (a paper) it simply means that he shall place it in the official custody of the clerk. That is all that is required of him, and if the officer omits the duty of endorsing upon it the date of filing, that should not prejudice the rights of the party."

Holman v. Chevaillier, 14 Texas, 339.

"We are of opinion, that the word 'filing,' * * * does not include the endorsing and indexing * * * but that a mortgage is filed within the meaning of the statute, when it is delivered to and received and kept by the proper officer, in his office."

Gorham v. Summers, 25 Minn. 81, 86.

This court, in the case of *Wabash & Western Ry. Co. v. Brow, 164 United States, 271*, exercised jurisdiction and granted a writ of certiorari in a case similar in principle to that before the court. Brow commenced an action in a state court, against the Wabash & Western Ry. Co., for personal injuries, making service upon a person he claimed authorized to receive process. The cause was, on the application of the defendant, removed to a federal court, where a motion to dismiss for lack of service of original process was refused because adjudged waived by a general appearance, and the defendant was required to answer. Upon writ of error from the Circuit Court of Appeals the decision of the Circuit Court was affirmed. Upon petition, a writ of certiorari was issued from this court and the judgment of the Circuit Court of Appeals set aside. In that case the lower court

assumed jurisdiction without having it, and in this case it refused to exercise jurisdiction when possessed of it.

In contemplation of the federal statutes and decisions, the writ is filed by lodging it with the clerk for the purpose of a return. We recognize the rule as first authoritatively and forcibly stated in the case of *Brooks v. Norris, 11 Howard, p. 207*, where the court says:

"The Act of 1789, chap. 20, s. 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question."

The section of the Judiciary Act referred to (*1 Stats. at Large, p. 84*), as well as the same statute incorporated in the Revised Statutes of the United States, in Secs. 997, 998, 999, 1000, 1007 and 1008 is no less conspicuous than Rule 14 of the Circuit Court of Appeals for the Ninth Circuit in omitting the word "file" or the term "filing" from every provision of the statute that relates to writs of error. The language of the original Judiciary Act, Sec. 22, is that "decrees and judgments" may be re-examined and reversed or affirmed "upon a writ of error, whereto shall be annexed and returned therewith at the time and place therein mentioned, an authenticated transcript of the record, an assignment of errors and prayer for reversal, with a citation to the adverse party signed by the judge," etc. And later along in the same section, "And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of."

Section 1008 of the Revised Statutes contains the same limitation as follows:

"No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree or order."

The court must look outside of both the language of the statutes and the rule to find the word "file" or the term "filing" or any similar expression. We respectfully submit that a technical filing in the narrow sense of that term at no time entered into the contemplation of the writers of the opinions of the Supreme Court where they held that a writ of error was not sued out or in the language of the statute "brought" until filed in the office of the clerk of the trial court. What they were seeking to do was to determine a time from which the control of the trial court ceased, and from which the period of limitation on appeal or writ of error began to run. They properly held that neither the act of issuing the writ from the higher court nor the attestation upon the writ fixed this time, but that placing the writ in the hand of the proper officer for obeying its command determined, viz., the filing or lodging of the writ of error with the officer whose duty it was to obey its mandate.

That such is the meaning of the statute, and such must have been the view of the court, is made manifest by Sec. 1007 of the Revised Statutes relating to supersedeas. That section provides:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment

complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterwards with the permission of a justice or judge of the appellate court."

What is expressed by the word "lodge" in this section, we contend is exactly what is meant in the opinions of the Federal courts. The writ of error is simply lodged with the clerk for the purpose of making a return by him upon it. It is in his custody transiently and temporarily. The lodging of the writ with the Clerk of the Court is doing all it is possible for the party appealing to do to make his right complete. If this were not true, a delay on the part of the clerk might rob the appellate court of its jurisdiction, or an honest misconception—as in this case—have the same effect.

We call attention to some of the opinions of this court, cited in the majority opinion of the Circuit Court of Appeals, in order to show that in the view of the judges it was the service upon the clerk of the trial court or a lodgment with or delivery to him of the writ of error that constituted the filing. An examination of the leading case of *Brooks v. Norris, 11 How., 207*, will show that no other sense of the term "filing" was in the court's mind. The language of Chief Justice Taney is that the writ of error is not brought until it is filed *in* the court which rendered the judgment, not *by* the court.

This meaning is very fully borne out by a reference to the case of *Mussina v. Cavazos, 6 Wallace, 355*, wherein Justice Miller defines what is necessary to confer jurisdiction upon the appellate court so far as the service of the writ of error is concerned. At page 358, he says:

"When deposited (the writ of error) with the clerk of the

court, to whose judge it is directed, it is served; and the transcript which the court sends here is the return to the writ, and should be accompanied by it."

Here it will be observed, that the deposit with the clerk of the lower court perfects the service and gives jurisdiction to the appellate court.

In the case of *Brandies v. Cochrane, 105 U. S. Rep., 262*, the same idea is borne out by showing how an appeal may be perfected. No formal order granting the allowance of an appeal was made, but the circuit judge approved the bond for an appeal and signed the citation. The opinion says:

"The bond was on the same day filed with the clerk, and the citation served on the 18th of August. * * * * The circuit court,, by taking the security and signing the citation allowed an appeal. No formal order of allowance was necessary."

It will be observed the court in speaking of the filing of the bond does not state it was filed *by* the clerk but it was filed *with* him. In other words, it was lodged with him for his official action.

So, in the case of *Scarborough v. Pargoud, 108 U. S. Rep., 567*, the question was whether the writ of error was brought within the two years, and in fixing the date for the computation of the limitation, the court says:

"The final decree in this case was rendered on the 13th day of July, 1878, and while the writ of error was allowed by the Chief Justice of the Supreme Court of Louisiana, and a bond approved and citation signed on the 5th day of July, 1880, the writ of error was not actually issued until the 14th, and the copy was not *lodged* in the clerk's office until the 16th of that month."

In this quotation the court expresses exactly what is meant by the filing with the clerk, not the act of the clerk in placing

his file endorsement upon the writ, but that the copy was not lodged in the clerk's office until the 16th of that month.

Again, in the case of *Polleys v. Black River Improvement Company, 113 U. S. Rep., 83,* the court says:

"Though the writ of error in this case seems to have been issued by the clerk of the Circuit Court of the United States on the 10th day of May, 1884, and is marked by him for some reason as filed on that day, it is marked by the clerk of the court to which it is directed, viz., the Circuit Court of La Crosse County, as filed on the 29th day of that month. It is not disputed that this is the day it was filed in his office."

It will be observed it does not state this was the day it was filed *by* him, but in the sense of the other decisions it was the day on which it was filed *in* his office.

Again, in the case of *Credit Company v. Arkansas Central Railway Company, 128 U. S. Rep., 261,* the court, after setting forth that the same rule is applicable to appeals as to writs of error, proceeds to state when an appeal is taken, as follows:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought,' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers, viz., the petition and allowance of appeal, (where there is such a petition and allowance) the appeal bond and the citation. In Brandies v. Cochrane, it was held that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office."

Were no further proof furnished of the filing of the writ than the supersedeas bond (See *Record, pages 392, 393, 394*) approved by the presiding judge, that should be sufficient. It will be

observed that Sec. 1007 of the Revised Statutes provides that where a writ of error may be a supersedeas, such supersedeas may be obtained by serving the writ of error, by "lodging" a copy thereof for the adverse party in the clerk's office, where the record remains, within sixty days, etc. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law as aforesaid within sixty days after the rendition of such judgment, or afterwards with the permission of a justice or judge of the appellate court.

It will be seen by page 394 of the printed record that such supersedeas bond was given on the day the writ of error was issued; upon the same day a copy of it was lodged in the clerk's office pursuant to Sec. 1007; and that the same judge who upon that day signed the citation, reciting that a writ of error had been filed in the clerk's office, approved the supersedeas bond, which could only in the orderly and proper course be done after the filing of the writ of error and the lodging of a copy with the clerk for the defendant in error.

THE STATUTE OF JEOFAILS IS APPLICABLE IN THIS CASE.

To prevent the sacrifice of rights to constructions so technical as adopted in this case, Sec. 32 of the Judiciary Act of 1789 (*Sec. 954 of the Revised Statutes of the United States*), was enacted, which is as follows:

"No summons, writ, declaration, return, process, judgment or other proceeding in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the

party demurring specially sets down, together with his demurrer, as the cause thereof."

Mr. Justice Story, *in 1st Gallison, at page 22*, in applying this statute, says:

"By the judiciary act of 1789, ch. 20, s. 32, it is enacted, that all the courts of the United States, may, at any time, permit either of the parties 'to amend any defect in the process of pleadings, upon such conditions, as the said courts respectively shall, in their discretion, and by their rules, prescribe.' The language of this section is sufficiently comprehensive to sustain the application for amendments in any cases before the court; but it has been attempted to be restricted to causes of *original*, and not to be extended to causes of *appellate* jurisdiction. But we find no such distinction in the statute; and even in appellate courts, proceeding according to the course of the common law, defects apparent upon the record may be amended, when they come within the general purview of statutes."

1st Gallison Rep., pp, 22, 23.

In *Warren v. Moody, 9 Fed. Rep., 673*, Pardee, C. J., in construing this statute, says:

"It (the case) came up for hearing at last term, when an amendment of substance was allowed to the original bill, and the cause continued to allow the defendant to meet the amended bill by motion to strike out or answer or plead, as counsel might advise. The defendant moves to strike out the amendment, and this motion presents the question whether it is allowable on appeal in equity to permit amendments to pleadings."

In *Kennedy v. Georgia State Bank, 8 How. 610*, it is said:

"There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. And the thirty-second section of the judiciary act of 1789 (now Rev. St. Sec. 954), allowing

amendments, is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction."

And then the court cites *Anon., 1 Gall. 22*, in which case Justice Story, in a forcible argument, holds that amendments may be allowed in appellate courts.

Under this Statute of Jeofails the omission of the endorsement of filing should have been over-looked, or the clerk of the Circuit Court permitted to make the same as of the time he received the writ.

The judgment appealed from was rendered October 17th, 1895. (See *Record, p. 92.*)

The writ of error bears date December 14, 1895, (See *Record, p. 395*), and was received by the clerk the same day (*Record p. 400*), and was returned January 4th, 1896.

PROOF OF THE FILING OF THE WRIT OF ERROR IS SUPPLIED IN THE RECORD INDEPENDENTLY OF AN ENDORSEMENT OF FILING BY THE CLERK OF THE CIRCUIT COURT.

By the timely and full return of the Clerk of the Circuit Court, annexed to the writ of error, it appears that a complete record was in the Circuit Court of Appeals, and the costs of the transcript had been paid by plaintiff in error (*Record, p. 400*). By the citation, reciting that the writ of error had been filed in the office of the Clerk of the Circuit Court, by the showing in the record that a copy of the original writ had been duly lodged in the office of the Clerk of the Circuit Court, by plaintiff in error (*Record, p. 398*), and by the supersedeas bond (*Record, p. 394*), and by the full showing of the affidavits (*Records, pp. 412, 414, 418*), it is made to definitely and certainly appear that the omission of the written endorsement of filing was supplied.

This state of facts brings the case under the rule laid down

by this court in *Ex Parte Parker, 120 United States, p. 737.* That case was dismissed from the Supreme Court of Washington Territory for the reason that evidence was not certified by the clerk of the trial court. This court looked beyond the certificate into the papers or documents contained in the record, which disclosed that all the evidence was before the Territorial Supreme Court, and said:

"It appears from these documents very clearly that nothing was ommitted in the transcript by direction of attorneys except the subpœnas; that all the testimony introduced by the parties on the trial before the referee was returned into the Supreme Court, duly certified as such; and that that constituted all the evidence introduced by the parties on the trial in the court below, in accordance with Sec. 451 of the Territorial Code: because it appears by the degree sought to be appealed from that the cause was finally heard upon the report of the referee, the exceptions thereto of the defendant Parker being overruled, and the report of said referee being in all things confirmed, except as modified and altered by the findings and conclusions of the court itself. It thus appears with certainty that the transcript contained all the evidence introduced by the parties on the trial in the court below."

IN VIEW OF THE UNCERTAINTY OF THE DECISIONS AS TO THE LAW CONTROLLING THE PERFORMANCE OF CONTRACTS LIKE THE ONE IN CONTROVERSY, THE OPINION OF THIS COURT WILL BE OF PUBLIC IMPORTANCE AND TEND TO SECURE UNIFORMITY OF DECISION.

The court instructed the jury that the policy was a New York contract and its provisions were dominated and controlled by the statutes of that state relating to insurance companies, and that compliance with such statutes was indispensable to a forfeiture of the policy for non-payment of the premiums. (*Record, pp. 349-351.*)

It is true the application recites that it was made subject to the charter of the company and the laws of New York, and that payments are to be made at the home office of the insurance company. The policy, however, provides that payments will be received anywhere in exchange for the company's receipt signed by its president (*Record, p. 3.*) In the provisions contained on the back of the policy, which are made a part of the contract, it is mutually agreed that notice is given and accepted that every premium is due at the date named in the policy, and that any further notice is expressly waived, and that the policy shall become void by non-payment of premiums, (*Record, pp. 3-4.*) It is agreed the policy shall not take effect until the first premium shall have been paid by the assured and the policy delivered to him during his continuance in good health (*Record, p. 6.*) The application was made, the medical examination had, the first premium paid to and the policy delivered by the agent of the insurance company at Seattle, Washington. The insurance company was, at the time transacting business in the State of Washington, having complied with its statutes. The laws of Washington gave unrestricted freedom of contract to both parties. It is thus seen the transaction had its inception in Washington and became a contract in that state; that the acts essential to bring it into being as an agreement were by both parties performed in Washington; that the parties thus interpreted the policy as a Washington agreement, and that the renewal receipt was placed in the hands of the agent at Seattle to exchange for the subsequent premium. The case in each of the elements going to determine where the contract was executed and by what law it should be governed is substantially like that of *Equitable Life Assurance Society v. Clements, 140 U. S., p. 226,* where Justice Gray substantially summarized the case as follows:

The assured was a resident of Missouri, and the application

was signed there; the policy was executed at the company's office in New York and provided that the contract is set forth in the application and policy taken together; the application declares the contract shall not take effect until the first premium has actually been paid during the life-time of the assured; that two premiums were paid in Missouri; that the answer admits the payment of the premiums; and that the petition alleges the policy was delivered in Missouri to the assured; and then says,

"Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

Equitable Life Assurance Society v. Clements, 140 U. S., 232.

Unrestricted freedom of contract is conspicuously made manifest in this policy. Whatever else may be doubtful there is no uncertainty left as to the intention of the parties in this respect. They agree that the notice contained in the policy is given and accepted by the delivery and acceptance of the policy, and expressly waive any other notice, and declare the contract shall become void by non-payment of premiums. This freedom of contract was guaranteed by the law of the state where the contract was made.

In the case of *Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397*, the court lays down the following rule:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a

contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country." P. 458.

The Brantford City, 29 Fed., 373, is forcibly in point. A contract was made at Boston with local agents of the British Steamship Company, by the terms of which libelants were to ship cattle on a British steamer from Boston, and deliver them at Deptford, England, for a freightage of eighty-five shillings sterling per head. The court says:

"2. The defendants contend, however, that, inasmuch as the cargo was taken on board a British ship, and as the bill of lading was signed by a British master, for transportation to England, the stipulations of the bill of lading exempting the ship from liability for negligence and from loss by death, however occasioned, afford a complete defense; because such stipulations are valid by the laws of England. * * * The question presented is a very important one. All the steamship lines, whether domestic or foreign, that sail from this port, insert in their bills of lading substantially the same conditions. Considering the number and the magnitude of the shipments by these lines, and the very diverse views found in the text-books and decisions upon this branch of the conflict of laws, I have deferred a decision of the cause until able to give the questions involved something, at least, of the consideration their importance demands. The conclusion to which I have come is that our law must prevail, whether the question be viewed as a question of responsibility for a tort or for the construction and validity of the exceptions in the bill of lading, in a conflict of laws; or as a question of evidence and procedure; or as a question of comity as related to our national policy."

Cox v. United States, 6 Pet., 83, 172, 203;
Scudder v. Union Nat'l Bank, 91 U. S., 406;
The Pennsylvania Co. v. Wm. Fairchild, 69 Ill., 260;
McDaniel v. The Chicago & N. W. Ry. Co., 24 Iowa, 412.

THE PARTIES TO THE CONTRACT INTERPRETED IT AS A WASHINGTON CONTRACT.

Doubt as to the policy being a Washington contract should be solved by the interpretation the parties themselves placed upon it. In addition to the application being made and the examination had in Washington, the premium paid and the policy delivered, and the insured becoming a member of the association there, we have the further fact that when the second premium became due the receipt for it, signed by the President of the insurance company, was sent to Seattle to be exchanged for the premium. The insured upon payment being demanded of him there by the agent, stated his inability to make payment of the premium. After the lapse of some days, the receipt was returned and the policy forfeited on the books of the company.

Record, pp. 260, 227-229.

The court instructed the jury there was positive evidence the insured did not pay more than the first premium.

Record, p. 353.

The fact that the insured did not tender nor the company demand the premium due September 24th, 1892, affords a demonstration that the parties interpreted the contract as made in Washington, and forfeiture resulted from non-payment according to their express stipulation.

In *Railroad Co. v. Trimble, 10 Wallace, 367*, the court says:

"It was referred to in the argument as showing the construction put by the parties upon the deed of Howe to Trimble of the 9th of July, 1844. Where there is doubt as to the proper construction of an instrument this feature of the case is entitled to great consideration." (*Page 377.*)

Nickerson v. A., T. & S. F. R. R. Co., 17 Fed. 409.

The State of New York has a declared statutory policy respecting insurance companies transacting business within her boundaries. In some particulars it is restrictive and severely penal. The State of Washington, doubtless owing to her remote and somewhat isolated situation, as an inducement to population, capital and business enterprises, adopted the same policy of freedom of contract with domestic and foreign corporations as accorded to natural persons. The policy of New York cannot displace that of Washington within the latter state. If the place of the law governing the performance of a contract is uncertain and suit is brought upon it in the state where it was made, and by the policy of the laws of that state the express stipulations of the contract are valid, that fact should cause a court to decide the contract to be performed under the laws of that state rather than under the laws of another government where such stipulations must be regarded as illegal or the public policy of the government defeated.

In *Mutual Ben. Life Insurance Co. v. Robison, 54 Fed. Rep., 580,* a New Jersey insurance company insured a citizen of the state of Iowa. The application was made in Iowa. The insurance was solicited in Iowa, where the application and examination were made. The application was forwarded by the company's agent to Newark, New Jersey, where the policy was issued. The application for the policy stated: "That such contract shall at all times and places be held and construed to have been made in the city of Newark, New Jersey, and this policy does not take effect until the first premium shall have been actually paid." The premium was paid and the policy delivered in Iowa. If a New Jersey contract, the company was not liable. If an Iowa contract, it was liable, because the Iowa statute made the solicitor and medical examiner agents of the insurance company, while the New Jersey statute did not. The court at pages 584, 588, says:

"We are, therefore, justified in holding that unless the clause in the application (with reference to construing the contract as made in New Jersey) shall take the case out of the rule as clearly established with reference to the point under consideration, the contract set out in the petition herein, must be construed by the laws of the state of Iowa. * * * We are, then, justified in holding that so far as the Iowa statute above quoted may apply to the contracts of insurance at bar, the Iowa law is the law which is to govern and furnish the rule of construction, 'anything in the application or policy to the contrary notwithstanding,' and a waiver thereof, as claimed by plaintiff, is ineffectual."

Wall v. Equitable Life Assur. Soc., 32 Fed., 273.
Berry v. Indemnity Co., 46 Fed., 439.
Equitable Life Assur. Soc. v. Winning, 58 Fed., 541.

THE INSURED DID NOT KEEP THE POLICY ALIVE BY THE PAYMENT OF ANNUAL PREMIUMS, AND THE CASE WAS SHIFTED FROM ALLEGED COMPLIANCE WITH THE POLICY ON THE PART OF THE INSURED TO LACK OF STATUTORY NOTICE BY THE INSURANCE COMPANY.

The defendant in error alleged in her complaint that the insured agreed in the policy to pay the annual premium of $3,770.00 in advance on the delivery of the policy, and each annual premium on the 24th day of September thereafter during the continuance of the contract; that he died September 12, 1893; that he performed all the terms and conditions of the contract on his part to be kept and performed to the date of his death. This latter allegation was controverted. The court instructed the jury there was no evidence that any premium save the one due on the delivery of the policy had been paid, but positive proof to the contrary. Defendant in error is seeking to recover a vast sum of insurance which was never purchased and for which no consideration was paid.

Mr. Pomeroy, in his work on *Remedies and Remedial Rights, Sec. 556*, says:

"The plaintiff is no longer permitted to aver the performance of the required act, and on the trial prove the circumstances which excuse such performance, or prove any other alternative than the one specially alleged."

She shifted her case from alleged compliance with the contract of insurance to an unpleaded failure on the part of the insurance company to give a certain notice required by the statute of New York. To have maintained a right of recovery under this statute it should have been pleaded.

Austin v. Goodrich, 49 N. Y. 366.
Churchill v. Onderdonk, 59 N. Y. 134.
Railroad Co. v. Sturgis, 44 Mich. 538; 7 N. W. 213.

CAN RECOVERY BE HAD ON A POLICY OF INSURANCE WITHOUT FIRST PAYING, OR OFFERING TO PAY, DELINQUENT AND UNPAID PREMIUMS?

The opinion of a majority of the court in the case of *Baxter v. Brooklyn Life Ins. Co., 119 N. Y. Rep., 450*, and cases adopting it, was followed as authority for a recovery of the insurance without first making payment or tender of delinquent premiums. The decision in that case was by a divided bench of four judges in favor and three in opposition. Andrews, J., with whom Earle and Gray, JJ., concurred, insisted that the payment or proper tender of delinquent premiums was a necessary condition precedent. From his opinion we quote as follows:

"But it is a condition precedent to the maintenance of such action that the plaintiff must, before suit brought, have paid or tendered the premium unpaid. The plaintiff, under the statute of 1877, is not required as before to show that it was

paid or tendered on the day fixed in the policy, but he must aver and prove that payment was made at some time before the action was commenced, or else no right of action has accrued. This is in accordance with the well-settled rule that in mutual promises the plaintiff seeking to charge the defendant, must aver and prove performance on his part of that which was the consideration of the defendant's promise, and this as well where the promise of the plaintiff was to be performed before the day fixed for performance by the defendant, as where the performances of respective promises were concurrent and dependent."

Loud v. Land Co., 153 U. S., 564.
Phillips Co. v. Seymour, 91 U. S., 646 (650).

There might be some more plausible ground for violating this rule of law and practice in states where the distinctions between law and equity are abolished than in the federal courts wherein such distinctions are definitely preserved.

This court has said concerning the nature of such a contract:

"It is an entire contract of life insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * * Each installment (premium) is, in fact, part consideration of the entire insurance for life. It is the same thing where annual premiums are spread over the whole life. * * * The whole premiums are balanced against the whole insurance."

Ins. Co. v. Statham, 93 U. S., 24 (30).
See also Kellner v. Ins. Co., 43 Fed., 623 (627).

Notwithstanding the New York statute, therefore, and even if it be held applicable to this contract, there became due from Mr. Phinney to the company September 24th, 1891, the premium of $3,770.00, and another of like amount September

24th, 1892, and such premiums remained due at the beginning of this action.

Thompson v. Ins. Co., 104 U. S., 252 (260).
Insurance Co. v. Unsell, 144 U. S., 439 (447).

In the former of these cases, the court says:

"A fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has therefore failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied on had been sufficiently favorable to pave the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all."

In the latter case, the beneficiary relied upon a waiver as excusing payment of the premium at the time the same was due and as defeating the right of the company's forfeiture; but there was evidence in this case that payment of the premium had been tendered subsequent to the due date. In discussing this question, Justice Harlan, at page 447, says:

"If the plaintiff had sued on the policies or certificates *without having paid or tendered the amount due to the company*, the nonpayment of which, at the time stipulated, was relied on to prove that the policies had become forfeited, that *fact would have been fatal to a right to recover, in any view of the case.*"

THE STATUTE OF NEW YORK DOES NOT APPLY TO A CONTRACT OF INSURANCE ENTERED INTO IN THE STATE OF WASHINGTON, AS DISCLOSED IN THE RECORD IN THIS CASE.

The question is presented in this case as to whether the

statute of New York cited in the petition has any application to a contract of insurance made, as this one, in the State of Washington.

The Mutual Life Insurance Company is shown to have been engaged in business in Washington, and in the course of and as a part of that business engaged in the contract in dispute. It cannot be asserted of a corporation, more than of a natural person, that it can only do business in the state of which it is a resident or citizen. The statute of New York is leveled at the business done in that state and applies its prohibitions alike to domestic and foreign corporations so engaged. Its language is "No Life insurance company doing business in the state of New York shall have power," etc.

Petition for Writ of Certiorari, p. 2.

This New York statute, therefore, not being one to regulate or determine the existence of New York corporations, but being one intended to apply to all corporations, both domestic and foreign, and only so far as they did business in New York, did not enter into and does not govern this contract made by this corporation, outside of that state.

U.S. Mtge. Co. v. Sperry, 24 Fed., 838; affirmed 138 U.S. 313.
White v. Howard, 38 Conn., 342 (461).
Ohio Life Ins. Co. v. Ins. Co., 11 Hump. (Tenn.), 24.
American Bible Society v. Marshall, 15 Ohio State, 543.
Bank of Louisville v. Young, 37 Mo., 407.
Vanderpoel v. Gorman, 140 N. Y., 563.
Warren v. The Bank, 38 N. E. Rep. 122, (Ill.)
Morawetz on Corporations, Secs. 967-968 (2nd Ed.)

The *United States Mortgage Company v. Sperry*, above cited, is particularly in point. The Mortgage Company was chartered by the State of New York, with power to loan money

upon real estate anywhere within the United States. Its charter prohibited its loaning money at a rate of interest exceeding the legal rate. The legal rate of interest, as established by the law of New York, was seven per cent per annum. It loaned money in the state of Illinois at ten per cent per annum, which rate was legal by the laws of that state, but illegal under the laws of the State of New York, and it was therefore contended that the rate of interest contracted for upon the Illinois loan was in violation of its chartered powers. The Supreme Court summarily disposes of this question, saying, at page 336:

"The general statute of New York had for its object to regulate the rate of interest upon loans there made, and not the rate upon loans made elsewhere. That state did not assume to fix the maximum of compensation to be paid to the lender for the use of money in other states. * * * When New York created the Mortgage Company, with power to loan money upon real estate anywhere within the United States, and prohibited it from lending money at a rate of interest 'exceeding the legal rate,' it did not intend to withhold from it the power to contract in other states, for interest upon moneys loaned, upon terms less favorable than those states permitted in respect to loans there made by other corporations, and by individuals."

The fact that this New York statutory regulation applies alike to foreign and domestic corporations transacting business in that state shows its provisions are not organic, entering into and becoming a part of the charters of New York corporations, but regulations within that state applicable to all corporations alike, and hence do not follow the domestic any more than the foreign corporation in its transactions beyond the state boundaries.

In *American Bible Society v. Marshall, 15 Ohio St., 545*, the court held that the New York statute of wills providing that "no devise of real estate to a corporation shall be valid unless

such corporation be expressly authorized by its charter or by statute to take by devise," had no effect beyond the limits of New York state. "It is not to be presumed," says the court, "that the legislature of that state intended to go further."

So in *White v. Howard, 38 Conn., 361*, where a similar question arose, the court said:

"Now this corporation stands at the bar of this court claiming the right to take lands within our territory by devise. It is clothed by such powers as have been conferred by its charter. Those, a portion of them, as we have seen, are to hold, purchase and convey real estate. It is not expressly authorized to take by devise, nor is it prohibited from so taking. Can it then take by devise? Not in New York, as we have seen. Therefore, not in Connecticut, say the counsel for the heirs at law, for being a New York corporation, and by the laws of that state devoid of power to take by devise, no argument is needed to show its inability to take by devise in Connecticut. This conclusion is too hastily drawn. If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion would be legal and logical. But the inability does not arise. There is no prohibition in the charter; the inability is created by the New York statute of wills expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York statute of wills, and cannot bring it to be recognized as law within the jurisdiction. There is an obvious distinction between an incapacity to take, created by the statute of a state, which is local, and a prohibitory clause in the charter, which everywhere cleaves to the corporation. The reasoning is fallacious, not recognizing this distinction. There being no prohibition in the charter, and the power to hold and convey real estate being expressly given, we must look to our own statutes and laws, and not to those of New York, to determine whether or not this corporation can take by devise in Connecticut."

The second section of the New York statute (*Petition, p. 3*)

harmonizes with and gives additional strength to this view. This section provides, "The affidavit of any one authorized by section one to mail such notice * * * shall be presumptive evidence of such notice having been given."

A rule making a mere affidavit evidence would only apply in New York courts, and indicates the regulation is intended to be only of local application. The statute is dealing with the "doing of business in New York," and hence the propriety of making an affidavit *prima facie* evidence in a judicial proceeding in that state where the mailing of the notice was in issue.

The Mutual Life Insurance Company was chartered by a special act of the legislature of the State of New York, entitled, "An act to incorporate The Mutual Life Insurance Company of New York," of date April 12th, 1842. It is true the legislature reserved authority in the 18th section of the act to alter, amend or repeal it. It never exercised the authority except when it amended the act in April, ____, and in April, 1862, but in matters in no wise bearing on this case.

DOES THE GENERAL STATUTE OF NEW YORK RELATING TO THE BUSINESS OF LIFE INSURANCE COMPANIES AFFECT THE MUTUAL LIFE INSURANCE COMPANY CHARTERED UNDER A SPECIAL STATUTE OF THAT STATE?

Now, the question to be solved here is, whether the act, from which the present clause in the insurance law is taken, chapter 341 of the laws of 1876, and chapter 321 of the laws of 1877 (*Petition, pp. 2 and 3*), affects the Mutual Life Insurance Company. Certainly it does not alter its charter; certainly it does not decrease its power; certainly it cannot affect any of its rights under the contract which it made with the

state. It is in violation of statutory construction to hold that a special act of the legislature is altered, amended or repealed by general legislation, unless particular reference is made to the special act, or it is otherwise made clearly manifest that the special legislation was intended to be embraced within the general act. It may be subjected indeed to the general provisions of law under the police power which the state has a right to enact.

This company is required by the statute to send a notice of the coming due of each installment of premium to the policyholder or his assignee, and if the court finds it has failed to do so in this case, what is the consequence? It must pay the penalty. Is the State of Washington going to enforce the penal laws of the State of New York, and collect from its disobedient corporations the sums which they have been mulcted in, for doing or not doing something which the laws of New York require to be done or to be left undone?

The authorities holding that states will not enforce the penal laws of other states within their jurisdiction, are too numerous to cite. We cite only those which hold that the United States courts sitting in other states enforce only the laws of the states in which they are sitting, and will not enforce the penal laws of other states.

The Antelope, 10 Wheaton, 66.
Flash v. Conn, 109 U. S., 371.
Lyman v. B. & A. R. R. Co., 70 Fed. R., 409.
Huntington v. Attrill, 146 U. S., 657.
Texas v. Day Co., 41 Fed. R., 228.
Wisconsin v. Pelican Co., 127 U. S., 265.

We, therefore, argue that the general statute of New York respecting notice did not become a part of the charter of the in-

surance company and cleave to it going with it into other states and was not intended to affect either its being or its transactions outside New York.

American Bible Society v. Marshall, 15 Ohio St., 543.

MEANING OF THE STATUTE OF NEW YORK.—WAS IT THE INTENTION OF THE LEGISLATURE TO PROTECT THE AMOUNT OF THE POLICY FROM FORFEITURE, IF NOTICE OF UNPAID PREMIUM WAS NOT GIVEN, OR ONLY SUCH PORTION THEREOF AS PREMIUMS ALREADY PAID HAD PURCHASED?

If the New York statute applies to this case and the penalties of failing to mail the notice prescribed by that statute are visited upon the corporation, what is the punishment? A mutual life insurance company is a mutual association of which every policy owner is a member, the corporation being but the agent or trustee of this association of individuals. By taking a life insurance policy and paying the annual premium he enters into partnership. One of the members of the association was entitled to have a certain statutory notice mailed to him by some agent of the corporation stating the amount of such premium or interest due on the policy, the place where the interest or premium is to be paid, and the person to whom the same is payable, the notice to state that unless the premium or interest then due shall be paid to the company or duly appointed agent within thirty days after the mailing of the notice the policy will become forfeited and void. This notice is not deposited in the mail, but the member is otherwise fully possessed of all the information such notice can impart and so confesses. He fails to pay his premium, not for want of notice, but for want of money, and from that time forward suffers his premiums to go unpaid. Shall he, under such circumstances, make the want of formal notice, though possessed

of actual notice, his excuse for taking advantage of his own failure to mulct his associates in damages to the amount of his failure? Is such the intent of the legislature?

To construe a statute properly there should be an appreciation of the exact quality of the evil against which it was aimed, its extent, and its mischief. If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute, then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all things, the statute must be construed in a spirit of justice. It must not be extended beyond the remedy which is sought to be enforced, and particularly it is not to be extended so as to do injustice, or inconvenience, or absurdity. We are not to suppose that the legislature, in attempting to remedy a wrong, itself committed a greater wrong, or that in its attempt to remedy a hardship it has committed injustice.

Now let us look at this statute in the light of these principles. Contracts of insurance are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid annual, or semi-annual, or quarterly installments of premium are paid to the company. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid, and that they should be so paid on the day they are due, because life insurance takes into account not only the average of human life, but compound interest upon the installments which are paid. To leave out either element would destroy the scientific theory upon which life insurance is based. The contract is not for a fraction of a year, or from one installment period to another; although there is that sort of insurance, called "term insurance," and this statute ex-

pressly excludes that sort of insurance from its provisions. But the insurance for life is the insurance which we are now to deal with; and the policy before you in this case, which is the contract upon which the adjudication of this case is to be made, shows exactly what was to be done by both parties to the agreement. The contract is in two parts. One is a proposition in writing, made in Seattle, in the State of Washington, September 22, 1890, and signed by Guy Carleton Phinney, and addressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as an inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy.

The policy contains the following provision: "*If this policy shall become void by non-payment of premiums, all payments previously made shall be forfeited to the company except as hereinafter provided.*"

Now, here is the forfeiture which the statute refers to, this is the forfeiture which it is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to continue a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute as that, not only is the forfeiture waived, which in this case amounted to one year's premium, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance

company which is unnecessary in order to accomplish the non-forfeiture of the premiums. It is not necessary to go to this length in order to sustain the statute. The statute was intended to provide that notice should be given of the recurrence of the payments, so that the policy-holder should not be taken by surprise, or affected by forgetfulness, oversight or sickness, and thus prevented from paying his premium on the very day it was due. It was an extension by the statute of an equitable interposition to prevent the forfeiture. This cannot be construed to bring about a greater forfeiture than it was made to prevent. It cannot be construed, without violating reason and justice, to mean that the policy-holder was forever discharged from his obligation to pay the premium because of the failure of this notice. There is something to forfeit. There is an accretion in the hands of the company of the surplus paid on each succeeding year the policy has been in force, which is forfeited unless the premium is paid. And to make sure the payment of which, the clause of forfeiture was inserted in the policy. *It is to prevent that forfeiture that the statute was passed; and in this case one year's premium has been paid. To do equity between the parties, you must deduct from that one year's premium the cost of carrying the insurance for one year as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case.* (See *Record, p. 336.*)

This is rendered clear by the decision of the Supreme Court of the United States in the case of the *New York Life Insurance Company v. Statham, 93 U. S., 24.* The policy in this case had become, by its terms, void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the condition of the country, being in a state of

war with the southern states. The court said it was not proper that the policy should be revived, nor that upon the policy-holder's offering the amount of the accrued premiums which had been withheld, together with interest thereon, the policy should be reinstated. Mr. Justice Bradley, on behalf of the court, exhibits not only his clear knowledge of equitable principles and their application to the ordinary affairs of life, but also his profound knowledge of life insurance. He says:

"There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associated in a great scheme; and unless there is power to end the risk as soon as the premiums end, the essential features, the mathematical calculations are all wrecked. Delinquency cannot be tolerated or redeemed, because, if one policy-holder, after having failed to pay his premium and allowed a considerable time to elapse before he attempted to reinstate himself, it would be only the policy-holder whose business would be unprofitable to the company who would so come back. The great mass of those who had defaulted would be able to get insurance cheaper somewhere else, and therefore they would not attempt to revive their policies, but would go out of the scheme altogether."

Says the court in that case: "Non-payment at the day involves forfeiture, if such be the terms of the contract." Then the court goes on to show that what there is in the hands of the company to be forfeited is surplus preminms over the amount which was necessary to carry the expired risk, and which is called in insurance circles the "reserve." That reserve is equitably the property of the insured; and when he is forced to go out of the company by the unforseen exigencies of war he is entitled to take that amount with him.

That is all that could have been forfeited under any circumstances by the contract. Now the statute comes in and says that the company shall not forfeit that, unless it gives notice,

This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die the whole amount of the insurance shall be paid over after deducting the back premiums. If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Phinney did in this case, then the company would hear of him as it has heard in this case, with a claim for the amount insured, without any attempt whatever to pay the premiums which are confessedly unpaid and in arrears. No legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium.

This statute is, as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute was exhausted upon the failure to give the notice in September, 1891, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1892. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given."

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premium on the ground of a continuous failure to give notice.

Fisher v. N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered. If, after suit was brought for the first penalty, the company did not avail itself of the notice and cease its illegal action, a suit might be brought for another, but in the quaint language of Judge Grover, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

In this case, had we been informed of the failure to give notice, we could promptly have corrected the omission, but then Mr. Phinney would have had to pay the premium within thirty days, which is just what he wanted to avoid.

CONCLUSION.

Certiorari is a permissible remedy in a case like the one here presented. We have cited as alike in principle the case of *Wabash Western Railway v. Brow, 164 U. S., 271.* We further call attention to *Saltonstall v. Birtwell, 164 U. S., 54,* wherein, it having been held that the right of an importer to recover excessive duties exacted could not be recovered unless it was shown protest had been made at the time of payment, (though made afterwards and within ten days after the ascertainment and liquidation of duties), and the judgment being affirmed by the Circuit Court of Appeals, this court granted a writ of certiorari.

While in the case of "*The Kate,*" *164 U. S. Rep., 458,* certain questions being certified to this court, it caused the whole record to be brought up in order to determine a case involv-

ing, as we apprehend, questions of less gravity and less importance, and tending less to establish uniformity of decision than the case at bar.

Telfener v. Russ, 162 U. S. Rep., 170, was an action by Russ, the holder of a contract to purchase large tracts of land from the State of Texas, against Telfener, to whom he had sold and assigned his contract, upon an alleged breach of the contract of assignment. A writ of certiorari was issued to the United States Circuit Court of Appeals for the Fifth Circuit.

So, also, in *Dashiell v. Grosvenor, 162 U. S. Rep., 425,* a patent infringement case where the decision of the Circuit Court of Appeals is final, as in the other cases cited.

The prayer of the petitioner invokes as an alternative relief to that of the writ of certiorari, the granting of a writ of mandamus. We were influenced to pursue this course by the seeming approval, or rather the lack of adverse criticism, in the case of *American Construction Company v. Jacksonville, Tampa & Key West Railway Co., 148 U. S. Rep., 372,* where such a method was adopted. In that case a writ of certiorari was granted. Jurisdiction of the Circuit Court being based upon the diverse citizenship of the parties, judgment of that court is final, and for that reason the relation of this court to the Circuit Court of Appeals would not be that of an appellate or supervising tribunal. The general power to issue a writ of mandamus requiring the inferior court to take jurisdiction of a cause which it has improperly refused to entertain does not apply.

In re Atlantic City Railroad, 164 U. S. Rep., 633.

Regarding the large amount involved in this litigation, the deprivation of the right of appeal by the dismissal of the writ of error, differences of judicial opinion respecting a number of

the questions raised and the unsettled rule as to a number of other questions presented, as well as the importance of a decision affecting numerous other outstanding policies of the Mutual Life Insurance Company of New York, and other life insurance companies similarly circumstanced, it is respectfully urged that a writ of certiorari be issued out of this Honorable Court to bring the record and cause before it in order that it may decide the entire matter in controversy as if the case had been brought before the court by writ of error; or, as an alternative, in case a writ of mandamus be regarded the proper relief, that such writ may issue out of this court requiring the Circuit Court of Appeals for the Ninth Circuit to reinstate the case and adjudge it according to law and the right thereof.

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No. 12.

JAN 22 1900
JAMES H. McKENNEY,
Clerk

Brief of Davies, Short, Allen & McKenney for P. C.

IN THE

Supreme Court of the United States.

Filed Jan. 22, 1900.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, deceased,

Defendant in Error.

On a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit. In Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

With Appendix of New York Premium Notice Statutes.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERICK D. McKENNEY,
Of Counsel.

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In the Supreme Court of the United States.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, deceased,
Defendant in Error.

No. 12.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT. IN ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error with Appendix of New York Premium Notice Statutes.

I.

STATEMENT OF PROCEEDINGS IN COURT BELOW.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division,

on the 24th day of September, 1894, to recover the sum of one hundred thousand dollars ($100,000) claimed to be due on a policy of life insurance against The Mutual Life Insurance Company of New York.

The case was tried before a jury and a verdict rendered in favor of the plaintiff for the sum of ninety-seven thousand and twelve dollars and eighty-four one hundredths ($97,012 84/100).

A motion for a new trial was duly made by the defendant company. The defendant company also moved to arrest the judgment and dismiss the cause, on the ground that it did not appear by the record, proceedings and testimony that the Court had jurisdiction. Both motions were denied by the Court, and a judgment rendered on the verdict for the amount thereof.

To reverse this judgment the defendant company sued out a writ of error to the Circuit Court of Appeals for the Ninth Circuit. This writ of error was dismissed on the ground that the Circuit Court of Appeals was without jurisdiction in the case by reason of an alleged failure to file the writ of error in the Court below.

For opinion of Court by Ross, Circuit Judge, concurred in by Hawley, District Judge (see Record, p. 438).

For dissenting opinion by Gilbert, Circuit Judge (see Record, p. 446).

A petition for rehearing was filed in the Circuit Court of Appeals, Nov. 16th, 1896. For petition see Record, p. 452, which petition was thereafter denied (see Record, p. 472).

On March 21st, 1897, a petition for a writ of certiorari was filed by the defendant company in the Supreme Court of the United States with a certified copy of the record. This petition was submitted together with a brief for the plaintiff opposing the petition for certiorari (see petition of defendant company and brief in opposition on file in records of this Court).

The writ of certiorari was thereafter granted by this Court and filed (Record, p. 474), and the case now comes before this Court on such writ of certiorari.

II.

Abstract of Pleadings.

The complaint in said action, as amended, alleged the issuance of the policy to Phinney, performance by him of all its conditions, his death, the appointment of defendant in error as executrix, and the performance by her of all the conditions in the policy, and prayed judgment against the defendant in the sum of one hundred thousand dollars ($100,000). (Rec., pp. 2-9.)

Plaintiff in error answering (second amended answer), admitted the issuance of the policy, and denied, either absolutely or upon information and belief, all the other material allegations of the complaint, and alleged affirmatively.

First.—That the premiums due on the 24th day of September, 1891, and the 24th day of September, 1892, had not been paid, and that the policy by its terms had therefore been forfeited (Rec., p. 63).

Second.—That the policy had, during the lifetime of said Phinney and the plaintiff in error, been waived, abandoned and rescinded (Rec., pp. 63, 64).

Third.—A breach of warranty on the part of said Phinney in his application (Rec., p. 64).

Fourth.—An estoppel as against the said Phinney and

the plaintiff in error, by reason of the surrender by Phinney to the plaintiff in error of the policy of insurance as hereinbefore stated, and by reason of the fact, as therein alleged, that all parties to said contract had since the surrender of said policy as aforesaid treated the said contract as a lapsed and forfeited one (Rec., pp. 65, 66).

These affirmative allegations were denied by the reply of defendant in error.

III.

Chronological Statement of Facts.

1890, September 22d, Guy C. Phinney, a resident of the State of Washington, executed an application at Seattle, Washington, to the defendant company for a policy of insurance on his life for the sum of one hundred thousand dollars ($100,000), payable to his executors, administrators or assigns. This application was forwarded by Stinson, the local agent at Seattle, to Mr. Forbes the General Agent for the Pacific Coast at San Francisco, and Mr. Forbes as such general agent forwarded such application to the Home Office of the Company in the city of New York. Pursuant to such application a policy as applied for by Phinney was issued bearing date September 24th, 1890, and forwarded from the Home Office of defendant company in the city of New York to Mr. Forbes, and by the latter transmitted to Stinson at Seattle, who delivered it to said Phinney in Seattle, receiving from said Phinney at the time of delivery the first year's premium thereon, amount-

ing to thirty seven hundred and seventy dollars ($3,770).

The policy provided amongst other things as follows: "The contract * * * shall not "take effect until the first premium shall have "been paid and the policy shall have been de- "livered during my continuance in good health."

The policy further provided that Phinney should pay an annual premium of thirty-seven hundred and seventy dollars on the 24th day of September in each year thereafter for twenty full years, provided he should live so long, and further provided as follows: "This policy shall become "void by non-payment of the premium; all pay- "ments previously made shall be forfeited to the "company except as hereinafter provided."

1891, September 24th. Shortly prior to this date, which was the date when the second premium was due, a notice was sent to Phinney by both Mr. Forbes, the general agent at San Francisco, and by Mr. Stinson, the local agent at Seattle, that his premium would be due on the 24th day of September, 1891. Between the time of the receipt of this notice by Phinney and the 24th day of September, 1891, he twice met Stinson, once on the street and once in the office of the said Stinson, and requested the said Stinson to accept his notes for the payment of the said premium. This Mr. Stinson refused to do, Mr. Stinson at the time of such refusal stating that he was unable to pay the premium on that day.

October and November, 1891. From four to six weeks after the premium became due, Mr. Phinney again met Stinson and stated that he was prepared to pay the premium, but was told by Stinson that

the premium could not then be accepted unless a certificate of health was furnished. Phinney then stated that he did not think he could obtain a certificate of health, from the fact that he had been rejected by another Company a few days before. No certificate of health was ever furnished, nor did Phinney ever tender the premium.

December, 1891—January, 1892. In December, 1891, or January 1892, in a conversation between Stinson and Phinney, Stinson requested Phinney to allow him to have the policy to use for canvassing purposes and Phinney then surrendered the policy to the agent with the statement, that as the same had lapsed he had no further use for it. The agent at this time received the policy and never returned it to Phinney.

1892, September 24th. The premium falling due on this day was not paid or tendered by Phinney, nor did Phinney after the surrender of the said policy to the agent ever take any action in regard thereto, or pay or offer to pay any premium thereon.

1893, September 12th. On this day and twelve days before the maturity of the fourth premium, Phinney died, leaving his last will and testament wherein he nominated the plaintiff his executrix.

1894, July. Prior to this date no proofs of death by the said Phinney were furnished to the defendant company or demand made of it for the payment of said policy, the policy having been up to this time treated by the defendant company, Mr. Phinney and the executrix of his estate, as a forfeited and lapsed policy. Mr. Phinney held policies in two other companies at the time of his death to both of which the plaintiff presented proof of Phinney's death within one month after his demise.

IV.

STATEMENT OF THE CASE REQUIRED BY RULE 21.

The following statement presents succinctly the questions involved and the manner in which they are raised :

The first question is, whether or not the Circuit Court of Appeals erred in dismissing the writ of error below for want of jurisdiction. This question is raised by the writ of certiorari granted by this Court (see Point I).

The second question is, whether the Statute of New York relied on applies or not to any premiums which are not demanded to be paid within the State of New York, and the question is raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point II).

The third question is, whether or not, under the circumstances, the policy was or was not a Washington contract governed and construed by the laws of Washington alone and not by the Statutes of New York in question. This question was raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point III).

The fourth question is, whether if the Statute of New York applies, its equitable and true construction, aids the plaintiff in keeping the policy alive. This question is raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point IV).

The fifth question is, whether, if any statutory notice be required, the sending of notice was not waived by Phinney, and whether actual knowledge possessed and acted upon obviated the necessity for statutory notice. This question was raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point V).

The sixth question, whether or not the policy in ques-

tion was not terminated after September 24th, 1891, by waiver, estoppel, abandonment and recission. This question is raised by exceptions to the charge to the jury at the trial Court and the assignment of errors passed thereon (see Point VI).

The seventh question is, whether or not it is not essential to the maintenance of this action that Nellie Phinney should have paid or tendered the premiums before suit. This question is raised by the charge of the trial Court to the jury and the assignment of errors passed thereon (see Point VII)

V.

Specification of Errors.

The following are the errors assigned by plaintiff in error, and upon which it relies for the reversal of this cause:

I.

The said Court erred in refusing to give the jury the following instructions requested by the plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney, the assured, annually, on the 24th day of September during the continuance of said contract, until premiums for twenty (20) full years should have been

paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12, 1893. The evidence in this case established the fact that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract, the premium falling due on September 24, 1891, and by reason of said non-payment of premium by said assured the said policy became and was void and of no effect after said date, and you are directed to find a verdict for the defendant." (Assignment Errors VI, Rec., pp. 366, 367.)

II.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12,

1893. The evidence in this cause establishes the fact that the assured Guy C. Phinney did not pay to the defendant, at the time mentioned in said contract, the premium falling due on September 24, 1892, and by reason of said non payment of premium by said assured the said policy became of no effect after said date, and you are directed to find a verdict for the defendant." (Assignment Errors VII. Rec., pp. 367-8.)

III.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of this contract, until premiums for twenty full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney, did not pay nor tender to the defendant at the time stipulated in said contract the premium falling due on September 24, 1892, and by reason of said non-payment or tender of premium by said assured said policy became and was void and of no effect after said date; and you are directed to find a verdict for the defendant." (Assignment Errors VIII. Rec., pp. 368, 369.)

IV.

That said court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract the premium falling due September 24th 1891, such non-payment by the said assured would render the said policy void and of no effect after said date; and, if you find the facts so to be, you will find a verdict for the defendant." (Assignment Errors IX. Rec., pp. 369, 370.)

V.

That the said court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy dollars ($3,770) should be paid by Guy C. Phinney,

the assured, annually on the 24th day of September during the continuance of said contract, until premiums for twenty full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in the contract the premium falling due September 24, 1892, you are instructed that said non-payment by the said assured would render the said policy void and of no effect after said date; and, if you find the facts so to be, you are directed to find a verdict for the defendant." (Assignment Errors X. Rec., p. 370.)

VI.

That the court erred in refusing to give the jury the following instruction requested by the plaintiff in error:

"You are instructed that it appears from the face of said policy that it contained the following clause as one of the provisions and requirements and conditions thereof: 'Notice that each and every such payment is due at the date named in this policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived.'

"And you are instructed that said waiver by the assured, Guy C. Phinney, of the sending of any notice required by any statute, was effectual and binding upon said assured, and is effectual and binding upon the plaintiff in this

action; and that, by reason of said waiver, it was not incumbent upon the defendant, in order to declare or claim a forfeiture of said policy by reason of the non-payment of premiums according to the terms of said policy, to send to the assured the notice mentioned and required by the laws of the State of New York for the year 1876, chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321, which is relied upon by the plaintiff, even if said statute were otherwise applicable to this contract.

"And you are further instructed, that by reason of said waiver, the failure to send statutory notice did not operate to prevent the forfeiture of said policy pursuant to its terms, by reason of the non-payment of premiums falling due thereon; and if you find from the evidence that Guy C. Phinney, the assured, did not pay to the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find that he did not pay the premium falling due thereon September 24, 1892." (Assignment Errors XI. Rec., pp. 370-2.)

VII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that it appears from the application, policy and pleadings in this action that Guy C. Phinney, the assured, was a resident of the State of Washington, and at all times therein mentioned, and that the application for said policy was signed by said Guy C. Phinney in said State, that said policy with the application, which constituted a part thereof, completely set forth the contract between the defendant and the assured.

" You are further instructed that said application provides that said policy 'shall not take effect until the first premium shall have been paid and the policy shall have been delivered.'

" You are further instructed that it appears from said pleadings that the first premium upon said policy was paid in Seattle, Washington, and that said policy was by defendant delivered to assured at the same place.

" You are, therefore, further instructed that the policy sued upon in this action never became a complete contract, binding upon either party to it, until the delivery of the policy of the payment of the first premium in the State of Washington, and that said policy is, therefore, a Washington contract, and is governed by the laws of the said State of Washington, and not by the laws of the State of New York. And that the law of New York hereinbefore referred to and relied upon by plaintiff is not applicable to and does not govern this contract. And if you find from the evidence that Guy C. Phinney, the assured, did not pay to the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find he did not pay the premium falling due thereon September 24, 1892." (Assignment Errors XII. Rec., p. 373.)

VIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

" You are instructed that upon any theory in this case the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death on September 12, 1893.

"And you are further instructed that the plaintiff executrix is not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant." (Assignment Errors XIII. Rec., p. 373.)

IX.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death on September 12, 1893.

"And you are further instructed that the plaintiff executrix was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past-due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant." (Assignment Errors XIV. Rec., p. 373.)

X.

That the said Court erred in refusing to give to the

jury the following instruction requested by plaintiff in error:

"If you find from the evidence of this case that the premium under this policy, maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death, on September 12, 1893, then you are instructed that the plaintiff-executrix is not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past-due premium. If you find from the evidence that said premium was still unpaid, and that the amount thereof had ever been tendered to the defendant prior to the beginning of this action, your verdict should be for the defendant." (Assignment Errors XV. Rec., p. 374.)

XI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the premium under this policy, maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death, on September 12, 1893, then you are instructed that the plaintiff-executrix was not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past-due premium. If you find from the evidence that said premium was still unpaid, and the amount thereof has never been tendered by the plaintiff to the defendant prior to the beginning of this action, your verdict should be for the defendant." (Assignment Errors XVI. Rec., p. 375.)

XII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that no waiver of the payment of the due premium, or of its tender, can avail the plaintiff, unless such waiver, with all the facts alleged to constitute the same, are alleged in the complaint of the plaintiff, or in her reply; and, there being no such facts pleaded, no evidence on such points can be considered by you, notwithstanding the statute of New York of 1876 and 1877, relied upon by the plaintiff; and, there being no testimony of such fact, you are instructed to find a verdict for the defendant." (Assignment Errors XVII. Record, p. 375).

XIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The plaintiff in her complaint in this action alleges performance of the conditions of the policy sued on, on her part and on the part of Guy C. Phinney. I charge you that, under the said contract, one of the conditions to be performed by the said Guy C. Phinney was the payment of the premiums falling due on September 24, 1891, and September 24, 1892, and the plaintiff cannot recover in this action without establishing the allegations of her complaint, performance under such contract—namely, the payment of said premiums, and, if you find from the evidence in this action that the premium of 1891 or the premium of 1892 was not paid by said Guy C. Phinney, then your verdict must be for the defendant." (Assignment Errors XVIII. Rec., p. 376).

XIV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that the said statute of New York for 1876 is local in its nature and applies only to the assured or their assigns residing in the State of New York, and that the said statute has no application to and does not govern the contract sued upon in this action; and if you further find from the evidence that the assured, Guy C. Phinney, failed to pay either the premium maturing September 24, 1891, or the premium maturing September 24, 1892, then you are directed to find a verdict for the defendant." (Assignment Errors XIX. Rec., p. 376.)

XV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"Notwithstanding the requirements of the statute of New York, that notices in a particular form and at a time prescribed shall be sent by life insurance companies before they shall have power to declare a policy of life insurance forfeited; yet if the jury finds from the evidence that the defendant sent a notice to the said Guy C. Phinney, although said notice was not in the form nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said premium, came to the representative of the company and requested further time in which to pay the said premium, and such extension of time was refused by said representative, and the said Phinney knew and recognized the fact to be that his

policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and that said premium was not paid, nor tendered by or on behalf of said Phinney at its maturity, then you are instructed that such conduct on the part of said Phinney, and of the representative of the company, would constitute a recognition by said Phinney of the notice sent to him as a valid notice, and a waiver on the part of said Phinney of the notice in the form and at the same time required by the New York statute, if the same were otherwise applicable. If you so find the facts to be, you must find a verdict for the defendant." (Assignment Errors XXI. Rec., p. 378.)

XVI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"Notwithstanding the requirements of the statute of New York, that notices in a particular form, and at the time prescribed, shall be sent by life insurance companies before they shall have power to declare a policy of life insurance forfeited, yet, if the jury find from the evidence that the defendant sent a notice to the said Guy C. Phinney, although such notice was not in the form nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said premium, came to the representative of the company, and requested further time in which to pay said premium, and such extension of time was refused by said representative, and said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and that said premium was

not paid or tendered to or on behalf of said Phinney at its maturity, then you are instructed that such notice so sent and acted upon would constitute a sufficient compliance with the provisions of the statute of New York in regard to the sending of notice, although the said notice was not in the form prescribed, nor at the time required by said statute ; and, if you find the facts so to be, you are directed to find a verdict for the defendant. (Assignment Errors XXII. Rec., p. 379.)

XVII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error :

" If you find from the evidence in this case that the said Phinney did not pay the premium falling due September 24, 1891, and by his subsequent course led the defendant to believe that he considered his policy forfeited, and that he no longer relied thereon as a binding contract, and that he abandoned the same, then his executrix would be estopped from now asserting the validity of said policy in this action ; and, if you find the facts so to be, you will find a verdict for the defendant." (Assignment Errors XXIII. Rec., p. 380.)

XVIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error :

" If you find from the evidence that said Phinney did not pay or tender the premium falling due on September 24, 1891, and that his course of conduct with the defendant

prior to his death, and the course of dealing with the defendant of the plaintiff subsequent to his death, are inconsistent with the idea that they or either of them relied upon the policy as a valid contract, and such as to lead the defendant to believe that no reliance was placed by them in said policy as a valid contract, and that the same had been abandoned, the plaintiff would be estopped from now asserting the validity of said contract; and, if you so find the facts to be, you must find a verdict for the defendant." (Assignment Errors XXIV. Rec., p. 380.)

XIX.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence that the said Guy C. Phinney stated to defendant's representatives in the State of Washington that he could not pay his premium falling due on the 24th day of September, 1891, it was equivalent to his saying that he could not go on with the contract, and that he had abandoned the same; and, if you find that the defendant assented thereto, then this would end the contract; and, if you so find the facts to be, you must find a verdict for the defendant." (Assignment Errors XXV. Rec., p. 381.)

XX.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the said Guy C. Phinney stated to the representative of the

defendant in the State of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representatives, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the non-payment of the said premium, this would constitute an abandonment and recission of this contract by both parties thereto, and would put an end to the same; and, if you find the facts so to be, you must find a verdict for the defendant." (Assignment Errors XXVI. Rec., p. 381.)

XXI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The statute of New York relied upon by the plaintiff relieves against a forfeiture without the sending of a proper notice in a single instance only. It does not contemplate successive defaults, nor does it in a particular case relieve the assured of more than one default. The assured cannot go on, year after year, without the payment of premiums, and have his policy still kept alive by the statute; and, if successive defaults occur, the policy is forfeited, notwithstanding the provisions of the law of New York of 1876 and 1877, and only in a proper case the policyholder is entitled to the benefit of the act of New York of 1879, relating to the surrender value of policies forfeited.

"And, if you find from the evidence that Guy C. Phinney did not pay the premium of 1892, you must find a verdict for the defendant." (Assignment Errors XXVII. Rec., p. 382.)

XXII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"Upon all the evidence in this case you are instructed to find a verdict in favor of the defendant." (Assignment Errors, XXVIII. Rec., p. 383.)

XXIII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to-wit:

"It is contended that the policy was not continuing as a live policy and binding contract at the time of Mr. Phinney's death, on account of this provision in the policy:

"The annual premium of three thousand seven hundred and seventy dollars shall be paid in advance on the delivery of this policy; and thereafter to the company at its home office, in the City of New York, and on the 24th day of September, in every year during the continuance of this contract until premiums for twenty (20) full years shall have been duly paid to said company.

"Each premium is due and payable at the home office of the company in the City of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. If this policy shall become void by non-payment

of premiums, all payments previously made shall be forfeited to the company, except as hereinafter provided.

"It is claimed by the defendant that, by reason of the conditions in the policy which I have read to you and the failure of Mr. Phinney in his lifetime to make the payments which matured and became payable on the 24th day of September, 1891, and on the 24th day of September, 1892, the policy lapsed, and the rights of Mr. Phinney under it were forfeited, so that it was not a continuing policy at the date of Mr. Phinney's death in 1893.

"Now, gentlemen, the law on this subject is this: These stipulations and provisions in the contract are controlled by positive statute of the State of New York. This policy was issued by a company doing business in New York, and by its terms the company became obligated to perform its contract in the State of New York. Mr. Phinney agreed to make his payments in New York, and the company was entitled to have proof of the death of Mr. Phinney made at its home office in New York. The State of New York is the place for the performance of the contract, and as to the obligations of the parties with respect to the performing the contract on both sides the laws of the State of New York must be applied.

"The law of the State of New York, therefore, dominates and controls the provisions and stipulations which I have read. The statute of New York which I have referred to makes this provision with reference to the forfeiture of life insurance policies, by insurance companies doing business in the State of New York, for non-payment of premiums:

"'Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premiums or interest shall be paid, and the persons to

whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or of the asignee of the policy, if notice of the assignment has been given to the company, at his or her last-known post office address, postage paid by the company, by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest, when due, shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and the payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be a full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding. But no such policy shall in any case be forfeited, or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice; provided, however, that the notice state when the premium will fall due, and that, if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided at least thirty, and not more than sixty days prior to the time when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.'

"It is also a part of the provisions of the same statute that life insurance companies doing business in New York shall not have power to forfeit any life insurance policy for non-payment of premiums, unless they give this kind of a notice and comply with this statute in regard to the mailing of the notice, either giving notice in advance of the due date of the premium at least thirty days, and not more than sixty days, and not more than sixty

days before the date or giving the notice afterwards and allowing thirty days from the date of mailing the notice for the payment of the premium. Without a compliance with this requirement, after the mailing of notice, the laws of New York deprive the insurance company of the power to forfeit the insurance policy. Compliance with this statute is an indispensable preliminary to the forfeiture for non-payment of premiums against the will and without the consent of the person insured. Strict compliance is required. If a notice does not contain the matters that the statute specifies must be in the notice, it is not a compliance, and the company would have no power to forfeit an insurance policy by reason of sending such defective notice. If a notice sent in advance or prior to the date when the premium is due is mailed twenty-nine days before that date, it is not a legal notice, it does not comply with the statute. If it should be sent sixty-one days before the date on which the premium is due, it would not be a compliance with the statute.

"The rights of the insurance company under the terms of this policy and statute of New York, would be these:

"That the company would have a right to insist upon the payment of each annual premium on the date specified in the policy. They have a right, by sending a notice, to exact payment on that date, and to forfeit the policy and all premiums paid for non-payment on that date. But in order to enjoy that right it is necessary that the statute of New York, as to mailing the notice, must be complied with. There is no proof in this case that the notice required by the statute of New York was ever sent to Mr. Phinney." (Assignment Errors XXIX. Rec., p. 383.)

XXIV.

That the said Court erred in giving the following in-

struction during the course of the charge to the jury, to wit:

"If the evidence in this case shows that Mr. Phinney did voluntarily, without being induced by false representations or deceit, rescind the contract and give up the policy rather than continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy, so that it would no longer be a continuing contract." (Assignment Errors XXX, Rec., p. 387.)

XXV.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"It is a question of fact, therefore, for you to determine from the evidence in the case whether there was a full, complete understanding and meeting of minds betweet Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson with that understanding, and whether, relying upon that understanding, the defendant subsequently acted" (Assignment Errors XXXI, Rec., pp. 387, 388).

XXVI.

That said Court erred in giving the following instructions to the jury after they had retired to consider their verdict, and upon their return into Court for further instructions:

Q. (*By the Jury.*) If there is no evidence *pro* or *con* as to legal notice being given, is the jury to consider

this want of evidence as conclusive that no notice was given?

"A. (*By the Court.*) Yes." (Assignment errors XXXII, Rec., p. 388.)

XXVII.

That the said Court erred in giving the following instruction to the jury after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (*By the Jury.*) Is notice waived when the insured calls on the agent previous to the date of payment, and arranges, or tries to arrange, for the payment of the premium on the due date?

"A. (*By the Court.*) No." (Assignment Errors XXXIII, Rec., p. 388.)

XXVIII.

That said Court erred in giving th following instruction to the jury after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (*By the Jury.*) Can this notice be waived by the acceptance of the policy?

"A. (*By the Court.*) No." (Assignment Errors XXXVI. Rec., p. 389.)

XXIX.

That the said Court erred in giving the following instruction to the jury after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (*By the Jury.*) Did the company have a right to ask for a certificate of health, after the due date, from Mr. Phinney, at the time he tendered payment of his second premium, according to the New York laws? If so, had they a right to refuse payment until such certificate of health was furnished?

"A. (*By the Court.*) No." (Assignment Errors XXXV, Rec., p. 389.)

XXX.

That said Court erred in rendering and giving that certain judgment in said cause, made and entered on the 17th day of October, 1895, whereby it was ordered and adjudged by said Court that said Nellie Phinney, as executrix of the last Will and Testament of Guy C. Phinney, deceased, do have and recover of The Mutual Life Insurance Company of New York the sum of ninety-seven thousand twelve and eighty-four one-hundredths dollars ($97,012.84), with interest and costs. (Assignment Errors XXXIX, Rec., p. 391.)

POINT I.

The writ of error to the Circuit Court of Appeals was improperly dismissed on the ground that such writ was not filed in the Court below.

The Circuit Court of Appeals held that the writ of error must be *filed* in the Court below, and that to constitute such "filing" or evidence thereof in the Appellate Court,

an endorsement by the clerk on the original writ is essential, and that the writ of error in the case at bar was not *thus filed.*

THE CLAIM OF THE PLAINTIFF IN ERROR IS THAT THE WRIT IS "FILED" BY LODGING IT WITH THE CLERK UNDER THE AUTHORITY OF LAW AND THAT THE WRIT WAS SO LODGED OR FILED IN THIS CASE, AND THAT SUCH FILING AS CLAIMED BY THE DEFENDANT IN ERROR IS ONLY EVIDENCE, IS DULY EVIDENCED.

(1)

RULES AND STATUTES GOVERNING WRITS OF ERROR.

There is no statute or rule of Court which requires the writ to be "filed" ipsissimis verbis.

The rules of the Ninth Circuit pertinent to this Point are as follows:

RULE 14.

Writs of Error, Appeals, Return and Record.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and

other proceedings, which are necessary to the hearing in this Court shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding Judge in any Circuit or District Court, that original papers of any kind should be inspected in this Court upon writ of error or appeal, such presiding Judge may make such rule or order for the safe keeping, transporting and return of such original papers as to him may seem proper, and this Court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall on vacation or in term time, and be served before the return day.

6 The record in cases of Admiralty and Maritime jurisdiction shall be made up as provided in General Admiralty, Rule No. 52 of the Supreme Court.

See "Rules of the United States Circuit Court of Appeals for the Ninth Circuit."

Appendix V, 7 United States Appeals, p. 733.

The Revised Statutes of the United States as to Supersedeas.

Section 1007 provides as follows:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterwards with the permission of a Justice or Judge of the Appellate Court."

See also Revised Statutes of U. S., Sec. 997-1008.

One of the earliest and leading decisions is:

Brooks *vs.* Norris, 11 How., 207.

The Court says:

> " *The writ of error is not brought, in the legal meaning of the term,* " *until it is filed in the Court which rendered the judgment. It is the* " *filing of the writ that removes the* " *record* from the inferior to the " Appellate Court, and the period of limitation prescribed by the act of " Congress must be calculated accordingly. The day on which the " writ may have been issued by the clerk, or the day on which it is " tested, are not material in deciding the question."

The condition of the record in Brooks *vs.* Norris was totally different from the record herein. In the Brooks it *affimatively* appeared by an *endorsement* on the writ itself that *it was not lodged or filed* within the five years. So in 146 U. S., 54, it appeared *affimatively* that the writ was not filed in time. In the Phinney record there is absolutely nothing to indicate that the writ was not lodged. The contention of Phinney is that it does not appear by *a file mark* that it *was lodged.* But the Court can only dismiss on the ground that the record shows it was *not lodged.*

In this case, the transcript and writ of error were regularly before the Circuit Court of Appeals, and the burden was on defendant in error to show affirmatively that the writ had not been filed. This burden was not sustained.

The Court in the opinion in the case at bar cites also in support of the above rule (Record, p. 439) :

> Mussina *vs.* Cavazos, 6 Wall, 355.
> Scarborough *vs.* Paragoud, 108 U.S., 567.
> Polleys *vs.* Black River Co., 113 U. S., 81.
> Credit Co. Lin. *vs.* Arkansas Central, 128 U. S., 260.
> Warner *vs.* F. & P. R. R. Co., 54 Fed. Rep., 920.
> Stevens *vs.* Clark, 62 Fed. Rep., 321.

(2.)

STATEMENT OF FACTS RESPECTING FILING WRIT OF ERROR IN THIS CASE.

Petition made for order allowing writ of error (Rec., p. 360).

This petition was accompanied by assignment of errors (Rec., p. 363).

An order was made granting a writ of error, and fixing the amonnt of the bond (Rec., p. 362).

The bond contains the recital that the "defendant has obtained from the said Court, a writ of error."

The original writ of error was issued (Rec., p. 402).

This writ of error commands the Judges to send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, *together with this* writ" (Rec., p. 403). This *original writ* bears the following *endorsement* (Rec., p. 403): "Received a true copy of the foregoing writ of error for defendant in error.

Dated this 14th day of Dec., 1895.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.

By R. M. HOPKINS,
Deputy Clerk."

We show under B below that this endorsement is practically *a file mark*.

The plaintiff in error being desirious of suspending the execution of said judgment, pending appeal, caused a copy of said writ of error to be lodged with the Clerk of the said Circuit Court for the District of Washington, on the 14th day of December, 1895, upon which the following endorsement was made:

> "Received a true copy of the foregoing writ of error for defendant in error, dated this 14th day of December, 1895, A. Reeves Ayres, Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington. R. M. Hopkins, Deputy Clerk." (Rec., p. 400.)

The original citation was issued and recites that the defendent is cited to appear.

"*Pursuant to a writ of error, filed in the Clerk's* "*office*" (Rec., p. 405).

This citation is signed by Judge Hanford, and is endorsed—

"Service of the within citation and receipt of a copy thereof admitted, this 14th day of Dec., 1895.

S. WARBURTON,

A. F. BURLEIGH,

Attorneys and counsel for Nellie Phinney, as Executrix of the last will and testament of Guy C. Phinney, deceased."

The Marshal also makes return of services upon Nellie Phinney, executrix (Rec. p. 406).

This original writ, and original citation with proof of service are marked "Transcript of Record" * * * Filed January 7th, 1896. F. D. Monckton, Clerk" (Rec. p. 407).

The clerk's certificate of transcript, that it certifies the "foregoing (which contains *copy* writ of error, and *copy* "citation) to be a full, true and correct copy of the re- "cord, papers and all proceedings had in the foregoing "entitled cause, *as the same remains of record and on file* "in the office of the clerk of said Circuit Court, and that "the same constitutes the return to the annexed writ of "error" (Rec., pp. 400 and 401).

It thus appears that the original citation recites that the original writ of error has been filed, and the clerk certifies that the original writ of error has been filed.

(3)

THE MOTIONS TO DISMISS AND TO AMEND.

On April 3, 1896, the defendant in error filed a motion on the record to dismiss the writ of error for want of jurisdiction because

"Said writ of error was not filed in the Court below" (Rec., p. 409).

The plaintiff in error made a counter motion for an order directing the clerk to amend his return so that the same should in all things conform to the statutes and rules, and supported this motion by affidavits of R. M. Hopkins, Deputy Clerk (Rec., pp. 412-477, James Quilter, Marshal (Rec., p. 418) R. C. Strudwick (Rec., p. 420).

The affidavit of the Deputy Clerk shows that the certificate in this case is in the form uniformly used by him for five years last past in making returns to writs of error (Rec., p. 413). The second affidavit of the Deputy Clerk states as follows:

"That immediately upon the filing of said order and bond I, at the request of said attorneys, issued the writ of error herein, a copy of which appears in the printed record at pages 398 and 399, and delivered said writ to R. C. Strudwick, one of said attorneys, who took the same from my office.

That a few minutes thereafter the said Strudwick returned to my office and delivered to and lodged and filed with me said writ of error, with the allowance thereof indorsed thereon by the before-mentioned Judge, and at the same time delivered to and lodged and filed with me a copy of said writ for the use of defendant in error.

That said original writ of error remained in my office and in my custody from said 14th day of December, 1895, until the 4th day of January, 1896, at which time I transmitted the same, with my return thereto, to this Honorable Court.

That the original citation herein, a copy of which appears on pages 395 and 396 of the printed record herein, was returned to and filed with me by a deputy marshal of the United States for the District of Washington, on the 18th day of December, 1895, and the same remained in my office and in my custody and control from said date until the same was transmitted to this Honorable Court, together with the writ of error and the return thereto, on the 4th day of January, 1896. It has not been my custom to indorse original citations and writs of error at the time they are filed with or served upon me, for the reason that I have deemed the same as writs of the Circuit Court of Appeals to be indorsed by the clerk of said Court upon his receipt of the same with my return thereto; but, as a matter of fact, the writ of error and citation herein were actually delivered to and filed and lodged with me as above stated."

The motion to dismiss came on to be heard in the said Circuit Court of Appeals at the June Term, 1896, and was heard at the same time that argument was had before said Court upon the merits, the same being taken under advisement. Two of the Judges being of opinion that said Circuit Court of Appeals was without jurisdiction to entertain the same for the reason that such writ had not been filed by the Clerk of the Circuit Court of the District of Washington, and the third being of contrary opinion, the said Court made and entered its judgment and order dismissing said writ of error.

Whereupon, the plaintiff in error presented its petition to said Court for a rehearing, which was duly taken under advisement by said Court, and afterwards, and on the 23d day of February, 1897, denied, as appears by a copy of the order of said Court.

A.

THE RECORD SHOWS AFFIRMATIVELY THAT THE WRIT OF ERROR WAS BROUGHT BY BEING PROPERLY LODGED OR FILED IN THE COURT.

See statement of facts above respecting filing writ of error in this case.

Let us see what the record in this case does show.

(1.) *Endorsements on the original writ.*

The original writ sent up to the Circuit Court of Appeals bears endorsement of the Clerk (who is the proper party to place the file mark according to the defendant in error) that on the 14th day of December, 1895, he received a true copy of such *writ* (Record, 402 to 404). That is, the Clerk states on the *original* writ that he had received a true copy of it. How could *this endorsement* have been placed by the Clerk upon the original writ unless it was in his possession. And if the original writ was in *his possession as Clerk*, it was lodged with him.

Again what is this endorsement but a file mark? It is *properly dated, and signed by the Clerk.*

In early times the great seal could not be put upon the suit, unless the writ was first signed and *allowed*. This is the origin of the *allowance*.

Crawle *vs.* Crawle, 1 Vernon, 169.

The writ is to operate on the Court having the record, and not upon the parties (Atherton *vs.* Fowler, 91 U. S., 146). How could, and how did this writ operate on the Court and clerk unless it had been lodged as the record shows it was with such Clerk. The effect of a writ of error is simply to bring the record into the upper Court. It removes the record. The recork was removed and this

could not have been done unless the writ was in the possession of the Clerk.

There is another view to be taken of this endorsement, and that is, that it shows conclusively not only that the writ was allowed by the Judge, but *issued by the clerk*, which is the same as lodging or filing. Thus in U. S. *v.* Baxter, 51 F. R., 624, the Court says that where the writ was allowed by the Judge, but was not actually issued by the Clerk it must be dismissed.

The Court will observe that the whole procedure, the petition (Record, 360), order granting writ, bond on writ of error, citation, original writ of error, took place on the 14th day of December, 1895.

(2.) *The record returned by the Clerk and the return itself are consistent only with a lodging or filing of the writ, and inconsistent with its not having been lodged or filed, and there is nothing in the record or return from which the Court can infer in any way that the writ was not lodged or filed.*

There can be no dispute but that the writ was allowed December 14th, 1895 (Rec., 362), and that it was issued (Rec., 402). Its existence is certain, th refore. The only question is, what became of it physically, of the paper itself? We have discussed above the endorsements upon it otherwise it was lodged with the clerk.

(*a.*) *The Bond.*

The writ of error having been allowed and obtained, it was desired to have it operate as a supersedeas, and to issue the citation. The bond was accordingly approved by the Judge (Rec., 394). The writ of error was signed by the clerk, and must therefore have been in his possession then, and there is nothing to show he ever parted with it, until the return was made.

The statute (Sec. 1007) declares that in a case where a

writ of error may be a supersedeas (that is, the writ of error issued and lodged), the defendant may obtain such supersedeas by serving the writ of error (that is, the writ of error issued and lodged) in the following manner: "By lodging a copy thereof (*i. e.*, of the writ issued and lodged) for the adverse party in the clerk's office, *where the record remains.*

(*b.*) *The Citation.*

The citation was *signed by the Judge* the same 14th of December. It recites "pursuant to a writ of error, *filed* " *in the Clerk's office* of the Circuit Court of the United " States, for the District of Washington."

Unless the recital was true the Judge had no power to sign the citation. It appears affirmatively by the statement of the Court itself, therefore, that the writ was filed.

In the case of Brooks *vs.* Norris, no such recital appeared.

The citation goes to the parties and brings them before the Appellate Court (Atherton *vs.* Fowler, 91 U. S., 146).

(*c.*) *The Return.*

The Revised Statutes, in Section 977, provide that there shall be annexed to and returned *with any writ of error* for the removal of a cause, a transcript of the record.

The writ of error commands that the record be sent "together with this writ," and the Clerk's certificate states that a copy of the record is sent "as the same remains of " record and on file in the office of the Clerk of said Cir- " cuit Court, and that the same constitutes the return *to* " *the annexed writ of error*," which *original* writ the Clerk attaches and sends up. *And yet the defendant in error claims that the record does not show that the writ of error was lodged with the Clerk.*

Certainly unless the record before this Court casts some

doubt upon the writ not being filed, the defendant in error cannot claim that it was not.

The proceedings above taken could not have existed unless the writ had been lodged with the Clerk. They are absolutely inconsistent with any other theory.

This is clearly shown by the case of *Ex-Parte* Ralston, 119 U. S., 613, where the Court says:

> "Certainly it has been the prevailing custom from the beginning for the Clerk of this court, or the Clerk of the Circuit Court for the proper district, to issue the writ, and for such a writ to be lodged with the clerk of the state court before he could be called on to make the necessary transcript for use in this court. Consequently, the simple lodging of the allowance with him cannot be considered as a demand for the writ; and, besides, this proceeding is not to require him to issue the writ, but *to furnish a transcript* to be annexed to and returned with the writ (Rev. Stat. Sect. 997), *which it is not his duty to give until there is a writ to which it can be annexed and with which it can be returned*. The application for the mandamus ls consequently denied."

The narrow idea of "filing" and the exclusive evidence of a "file mark" has no warrant in the history of the writ. The substance of the procedure is simply a writ properly allowed, and in the possession of the clerk of the inferior court, and annexed by him to the transcript. All that appears here.

Tidd's Practice (London, 1837) shows this: "The writ "of error being made out, is sealed in Chancery, either "on a general seal day, or, which is somewhat more "expensive, at a private seal; and after being obtained "from the cursitor, should be taken to the clerk of the "errors of the court in which the judgment was given, "who will *allow* the same, on being paid his fees, and "make out a certificate or note of the allowance; a "copy of which shall be served on the attorney for the "defendant in error" (p. 601). "The next step to be "taken by the plaintiff in error, except on a writ of error "*coram nobis* or *vobis*, is to *certify* or *transcribe* the

" record ; in order to which a transcript is made and sent, " *with the writ of error* and return, into the court " above."

(d.) The Motion to Amend.

The affidavit on this motion showed conclusively that the fact of lodging existed as indicated above in the record.

This state of facts brings the case under the rule laid down by this Court in *Ex-parte Parker*, 120 United States, p. 737. That case was dismissed from the Supreme Court of Washington Territory for the reason that evidence was not certified by the Clerk of the Trial Court. This Court looked beyond the certificate into the papers or documents contained in the record, which disclosed that all the evidence was before the Territorial Supreme Court, and said :

> " It appears from these documents very clearly that nothing was omitted in the transcript by direction of attorneys except the subpœnas ; that all the testimony introduced by the parties on the trial before the Referee was returned into the Supreme Court, duly certified as such ; and that that constituted all the evidence introduced by the parties on the trial in the Court below, in accordance with section 451 of the Territorial Code ; because it appears by the decree sought to be appealed from that the cause was finally heard upon the report of the Referee, the exceptions thereto of the defendant Parker being overruled, and the report of said Referee being in all things confirmed, except as modified and altered by the findings and conclusions of the Court itself. It thus appears with certainty that the transcript contained all the evidence introduced by the parties on the trial in the Court below."

So in Hamilton *vs.* Stafford, 78 Ill. App., 54, where the Court says : " We think the Court committed no error in " permitting said papers to be filed as of the date where " the transcript was filed. The testimony of the Justice " shows he filed them with the transcript, *and their fail-* " *ure to receive the file mark, then seems to have been due* " *to some mistake* in the clerk's office for which appellee " is not responsible."

B.

THE WRIT OF ERROR WAS PROPERLY LODGED OR FILED, EVEN IF NOT ENDORSED "FILED" IPSISSIMIS VERBIS.

We contend that filing is lodging with one having authority to receive. Endorsement of a file mark *ipsissimis verbis* is not necessary, but if it exists is only evidence of such lodging.

The question is whether the depositing or lodging with the Clerk of a Circuit Court of the United States at his office, at a usual hour, of a writ of error duly issued out of the Circuit Court of Appeals, and the payment to him of his fees and expenses for furnishing a transcript of the record, and a return of said writ by such clerk into the Circuit Court of Appeals with the record, transcript and papers in the case, as in detail hereinbefore more fully set forth, reciting that said writ of error has been filed, constitute such a filing of the writ of error in the Circuit Court as to confer jurisdiction upon the Circuit Court of Appeals, or whether, in order to confer jurisdiction, it is indispensably necessary that the Clerk of the Circuit Court write or endorse his filing mark on such writ of error. We have shown in A that the writ was lodged. It remains in this point to show the file mark unnecessary.

The plaintiff in error did all the law required of it by lodging the writ of error with the Clerk of the Circuit Court, requesting its filing, making payment of all fees and charges as estimated by the Clerk, requesting the Clerk to obey the mandate of the writ, and receiving the consent of that officer to do so.

DOES A WRITTEN ENDORSEMENT OF FILING BY THE CLERK UPON THE WRIT CONSTITUTE THE FILING CONTEMPLATED BY LAW, OR THE SOLE EVIDENCE OF THE LODGING OF THE WRIT, AND IS SUCH WRITING OR FILE MARK INDIS-

PENSABLE TO THE JURISDICTIONOF THE APPELLATE COURT?

Was it intended that the Federal Appellate Courts should be without jurisdiction and appealing parties remediless, if a Clerk of a Circuit Court, though having correctly performed every duty required of him by the mandate of a writ of error lodged with him, through ignorance, mistake or inadvertence failed to place a file mark upon it?

On the contrary, it is submitted that the lodging of the writ of error with the Clerk for the purpose of the return constitutes the filing contemplated by law. When the writ of error is placed in the custody of the Clerk of the Circuit Court at his office during usual office hours, and he is requested to make return and accepts his fees from the appealing party for that purpose, such writ is filed in the Clerk's office. An endorsement of filing affords the usual and convenient proof of what has been done, but it does not constitute the filing, nor does it afford the only proof thereof.

> "Careful practice would require that the Clerk receiving the papers should endorse upon them the date of the filing; but such endorsement is not the filing, it is simply evidence of such filing. A paper is filed when it is delivered to the proper officer and by him received to be kept on file."
>
> *Powers* vs. *State*, *87 Indiana*, *144-148*.

> "We think that a certificate of the Clerk, entered upon the brief at the time it is filed, is the best evidence of such filing, but that it is not necessary to the act of filing. 'A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file.' 13 Vin. Abr., 211; 1 Bouv. Law Dict., 568. The written memorandum of the Clerk is but the evidence of the delivery to him of the paper intended to be filed. In its absence, other testimony may properly be admitted to show that such paper was filed."
>
> *Peterson* vs. *Taylor*, 15 Georgia Rep., 483 (60 Am. Dec., 706).

"All the party can do in order to have his deed filed, is to take it to the officer, and deliver it to the Recorder. When he has done this, he cannot be charged with any default or negligence. The deed is then, in contemplation of law, filed for record."

Cook vs. *Hall*, 1 Gilman (Ill.), 575, 579.
1 Bradwell (Ill.), 145.

In the Matter of Norton, 34 N. Y. Appellate Div. Reports, 79, the statute required a certificate of election to "be filed" with the clerk. The Court said:

"A compliance with the letter of the statute is had when the paper is placed in the possession of the clerk, wherever he may be. * * * In the present case, in order to secure to the petitioner his full legal right, and to give to the voters the opportunity to vote for the candidates of their choice, we think that however technical may be the meaning which attaches to the word 'file,' it must be held to be satisfied when the certificate is left with the clerk, and that such act satisfied the requirements of the statute as to filing with him."

In the case of Bailey *vs.* Costello, 94 Wis., 87, the Court says:

"The objection to the reception in evidence, and validity, of the plaintiff's mortgage, as against the defendant, on the ground *that there was no endorsement upon it* to show that it had been filed in the town clerk's office of the town of Richland, is untenable. In legal contemplation, the filing of the mortgage was completed when it was delivered to, received by and left with the town clerk of the proper town. Marlet *vs.* Hinman, 77 Wis., 140; Smith *vs.* Waggoner, 50 Wis., 160; Goodman *vs.* Baerlocher, 88 Wis., 297; Manhattan Co. *vs.* Laimbeer, 108 N. Y., 590. Plaintiff ought not to suffer for the default of the clerk, who was a public officer, and over whose acts he had no control."

In Edwards *vs.* Grand, 53 Pac. Rep., 796, the Court says:

"An instrument is 'filed' for record when it is deposited in the proper office, with a person in charge thereof, with directions to record it. Tegambo *vs.* Mining Co., 57 Cal., 501. *Indorsing the fact and time of its deposit is not an essential part* of the filing."

See *dissenting opinion* of Judge Gilbert, Circuit Judge (Record, p 446), in harmony with the foregoing authorities, clearly demonstrating that the writ of error had been duly filed and the Circuit Court of Appeals was possessed of jurisdiction of the case.

In the recent case of *Wheeling Pottery Company* vs. *Levi*, 19 Southern Reporter, 752, it is said:

"The filing (of the petition) was overlooked by the clerk. It was handed to him in his office to be filed. It was received by him, acted upon, and was to be kept on file, and it was a document of his office. Having been placed by the attorney in the hands of the filing officer in his office, to be filed, and it having been acted upon, as already stated, and the contemporaneous facts rendering it evident that all was done in the utmost good faith, and that the omission was owing to a mere inadvertence of the officer, we think that the plaintiffs complied with the law to every intent and purpose. The absence of the 'file mark,' under the circumstances, cannot operate to his prejudice. 'Filed' is the best evidence that the document is of record, but it is not always and under all circumstances the only evidence that will prove that a petition is of record, when, owing to clerical error, it is not expressly endorsed."

We make the following quotations from opinions of Courts upon the same subject:

"But where the law requires or authorizes a party to file it (a paper) it simply means that he shall place it in the official custody of the clerk. That is all that is required of him, and if the officer omits the duty of endorsing upon it the date of filing, that should not prejudice the rights of the party."

Holman vs. *Chevaillier*, 14 Texas, 339.
Gorham vs. *Summers*, 25 Minn., 81, 86.

The section of the Judiciary Act referred to in Brooks *vs.* Norris, above quoted (1 Stats. at Large, p. 84), as well as the same statute incorporated in the Revised Statutes of the United States, in Secs. 997, 998, 999, 1000, 1007 and 1008 is no less conspicuous than Rule 14 of the Circuit Court of Appeals for the Ninth Circuit in omitting the word "file" or the term "filing" from every provision of the statute that relates to writs of error.

The Court must look outside of both the language of the statutes and the rule to find the word "file" or the term "filing" or any similar expression. We respectfully submit that a technical filing in the narrow sense of requiring a *file mark* did not enter into the contemplation of the Supreme Court when they held that a writ of error was not sued out, or in the language of the statute "brought" until filed in the office of the clerk of the trial Court. What they were seeking to do was to determine a time from which the control of the trial Court ceased, and from which the period of limitation on appeal or writ of error began to run. They properly held that neither the act of issuing the writ from the higher Court nor the attestation upon the writ fixed this time, but that placing the writ in the hands of the proper officers for obeying its command determined, viz.: the filing or lodging of the writ of error with the officer whose duty it was to obey its mandate.

What is expressed by the word "lodge" in section

1907 we contend is exactly what is meant in the opinions of the Federal Courts. The writ of error is simply lodged with the clerk for the purpose of making a return by him upon it. It is in his custody transiently and temporarily. The seeing that the writ is lodged with the clerk of the Court is doing all it is possible for the party appealing to do to make his right complete. If this were not true, a delay on the part of the clerk might rob the Appellate Court of its jurisdiction, or an honest misconception—as in this case—have the same effect.

In the case of United States Nat. Bank *vs.* First Nat. Bank, 79 Fed. Rep., 302, the Circuit Court of Appeals, Eighth Circuit, speaking with reference to this very case through Thayer, Circuit Judge, in regard to the filing of the writ of error, says:

> "We have examined the decision in the case of Insurance Co. *vs.* Phinney, 22 C. C. A., 425; 76 Fed., 617, to which our attention has been directed, but we are not able to concur in the view that seems to have been entertained by the majority of the judges in that case. We think it is altogether the more reasonable view that the substantial requirements of the law are satisfied when the record shows that the writ of error was actually lodged with the clerk, and that it is the lodgment of the writ with that officer, rather than the notation of the filing, which renders it operative."

We call attention to some of the opinions of this Court, cited in the majority opinion of the Circuit Court of Appeals, in order to show that in the view of the Judges it was the service upon the clerk of the trial Court or a lodgment with or delivery to him of the writ of error that constituted the filing. An examination of the leading case of *Brooks* vs. *Norris*, *11 How.*, *207*, will show that no other sense of the term "filing" was in the Court's mind. The language of Chief Justice Taney is that the writ of error is not brought until it is filed *in* the Court which rendered the judgment, not *by* the Court.

This meaning is very fully borne out by a reference to

the case of *Mussina* vs. *Carazos*, *6 Wallace*, *355*) wherein Justice Miller defines what is necessary to confer jurisdiction upon the Appellate Court so far as the service of the writ of error is concerned. At page 358 he says:

> "When deposited (the writ of error) with the clerk of the Court, to whose Judge it is directed, it is served; and the transcript which the Court sends here is the return to the writ, and should be accompanied by it."

Here, it will be observed, that the deposit with the clerk of the lower Court perfects the service and gives jurisdiction to the Appellate Court.

In the case of *Brandies* vs. *Cochrane*, *105 U. S., Rep., 262*, the same idea is borne out by showing how an appeal may be perfected. No formal order granting the allowance of an appeal was made, but the Circuit Judge approved the bond for an appeal and signed the citation. The opinion says:

> "The bond was on the same day filed with the clerk, and the citation served on the 18th of August. * * * * The Circuit Court, by taking the security and signing the citation allowed on appeal, no formal order of allowance was necessary."

It will be observed the Court in speaking of the filing of the bond does not state it was filed *by* the clerk but it was filed *with* him. In other words, it was lodged with him for his official action.

So, in the case of *Scarborough* vs. *Parogud*, 108 U. S. Rep., 567, the question was whether the writ of error was brought within the two years, and in fixing the date for the computation of the limitation, the Court says: The writ was not "lodged" until after the two years.

The Court expresses exactly what is meant by the filing with the clerk, not the act of the clerk in placing his file endorsement upon the writ, but that the writ was not lodged in the clerk's office until the 16th of that month.

Again, in the case of *Polleys* vs. *Black River Improvement Company, 113 U. S. Rep., 83*, the Court says:

> "Though the writ of error in this case seems to have been issued by the clerk of the Circuit Court of the United States on the 10th day of May, 1881, and is marked by him for some reason as filed on that day, it is marked by the clerk of the Court to which it is directed, viz: the Circuit Court of La Crosse County, as filed on the 29th day of that month. It is not disputed that this is the day it was filed in his office."

It will be observed it does not state this was the day it was filed *by* him, but in the sense of the other decisions it was the day on which it was filed *in* his office.

Again, in the case of *Credit Company* vs. *Arkansas Central Railway Company, 128 U. S. Rep., 261*, the Court, after setting forth that the same rule is applicable to appeals as to writs of error, proceeds to state when an appeal is taken, as follows:

> "An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the Court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the Appellate Court. This is done by filing the papers, viz., the petition and allowance of appeal (where there is such a petition and allowance), the appeal bond and citation. In *Brandies* vs *Cochrane*, it was held that in the absence of a petition and allowance the filing of the appeal bond, duly approved by a Justice of this Court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the Clerk's office."

In addition to the authorities citing above we submit the following:

In *ex parte* Thorn, 8 Law Rep. Chanc. Appls., 722, Sir JAMES BACON, C. J., in the Court below, said: "The file no doubt begins when the papers are handed to the Registrar." The statute provided that a certain paper might be signed prior to the filing or registration of the resolution. The Lords Justices on appeal held that it must be signed "before the resolution is either filed or registered."

This points to "filing" as consisting in handing the document to the Registrar under authority of law. (See citations in this case.)

In Irwin Executors *vs.* McGuire, 44 Ala., 499, the Revised Code provided that a person must "file" his claim in the office of the Judge of Probate within nine months. It was objected by defendant that it was not filed. The defendant proved that there was nothing in the records of the Probate Court nor among the papers on file to show that the note had been filed in the Court. The plaintiff proved that an attorney had presented the claim to the Clerk of the Probate Judge at the Probate Court to be filed against the estate. Search was made for the claim in the Probate Court, but could not be found. The Court held "that a copy of a claim against an insolvent estate, properly verified, *delivered to the Clerk of the Probate Judge*, is a sufficient filing under Section 2196 of the Revised Code."

See Flynn *vs.* Shackelford, 42 Ala., 202.

In Minnesota the statute required that a chattel mortgage or a true copy should be filed. The Court held that such mortgage was filed within the meaning of the statute when it was delivered to and received by the proper officer in his office for the purpose of notice mentioned in the statute. The Court said:

> "Irrespective of our statute, we think that an inquiry for the ordinary meaning of the word 'file' will lead to the same conclusion. 'File' meant at common law, 'a thread, string or wire, upon which writs and other exhibits in Courts and offices are fastened or filed for the more safe keeping and ready turning to the same.' (Wharton's Law Lexicon, Bouvier's Law Dictionary.) Within this definition, a paper might be said to be filed when strung upon the thread, string or wire. That particular mode of filing having almost entirely gone out of use, another mode of filing, the purpose of which is the same, has taken its place, so that, as Bouvier says, 'A paper is said also to be filed, when it is delivered to the proper officer, and by him received to be kept onfile.' This, which we take to be the present ordinary sense of the word 'filed,'

would be presumed to be the legislative sense, unless the contrary is made to appear. That the contrary does not appear is quite manifest from our previous examination of the statute. (See Green *vs.* Garrington, 16 Ohio St., 548.)

If this, our construction of the statute is, as we think it is, the proper construction, parties have a right to rely and act upon it. It is, therefore, not important, so far as the question of construction is concerned, that it would be better policy (as it perhaps would be), to make indorsing and indexing essential to the notice which it is the object of the statute to secure."

Gorham *vs.* Summers, 25 Minn., 86.

The King *vs.* Wade, 1 Barnewell & Adolphus, 861, TENTERDEN, C. J.: "I think, therefore, filing must be understood here to mean depositing for the purpose of being filed, the society doing all that is incumbent on them."

A statute in Massachusetts required a paper to be filed in the office of the Town Clerk." The Court said:

"A document may properly be said to be filed with the Town Clerk when it is placed in his official custody, and is deposited in the place where his official records and papers are usually kept. There is nothing in the statute, requiring his constant attendance, and if the paper in this case was in his custody ready for the signature of the selectmen, and if a majority of the board called at his house, signed the paper and returned it to its place of deposit in the safe, more than seven days before the town meeting, it was a sufficient compliance with the statute. It is immaterial that he was absent when they called. His wife might lawfully act as his agent for the purpose of exhibiting the paper, and restoring it when signed to its place of deposit. It is a convenient and proper practice to indorse a memorandum of the date upon the paper, but the statute does not make it indispensable."

Reed *vs.* Acton, 128 Mass., 130.

The case of Coleman *vs.* State, 2 Iowa, 91, the Court said: "He contends that the Court had no jurisdiction of the cause because the indictment does not appear to have been filed in the Allen Circuit Court. We understand a paper in a cause to be filed when it is delivered to

the Clerk and received by him to be kept with the papers in the cause, Bouv. Dic., Tit., "file."

In Adams *vs.* Goodwin, 25 S. E. Rep., 24, Supreme Court of Georgia, June, 1896, the Court held that "Where an affidavit to foreclose a chattel mortgage and the mortgage itself have been handed to a Justice of the Peace, this is a sufficient 'filing' of these papers with that officer."

Sometimes statutes do require papers to be endorsed, as in Fanning *vs.* Fly, 2 Caldwell Tenn., 488, where the Code provided that "All pleadings shall be endorsed by the Clerk when filed, with the time and date, and for want of such an endorsement, may be rejected by the Court on motion, unless sufficient cause is shown. The Court said:

> "It is insisted that this provision of the Code is imperative, and that a declaration, which accident or design may have placed on the file without the Clerk's indorsement, is not such a legal paper as the defendant would be bound to notice by plea or otherwise. A paper is said to be filed, when it is delivered to the proper officer, and by him received to be kept on file; and papers put together and tied in bundles are called a file (1 Baurice, title 'Lieb,' citing Vin. Ab., 211). The Clerk's indorsement, under our practice, is necessary to give the opposite party notice of the true time at which the declaration or plea was filed, so that he may know when to plead or reply; but it is not an absolute prerequisite to the validity of the declaration or plea, as clearly appears from the language of the statute itself. The statute, in terms, authorizing the Court, on motion, to reject a paper not so indorsed, or at his discretion, for sufficient cause shown, to retain it on the file and compel the opposing party to answer it; or the opposite party may waive his right to have it stricken off the file and plead or reply; and after plea or verdict, on judgment by default, regularly taken and entered, without motion to reject it, he must be held to have waived his right under the statute."

This case plainly shows that the "endorsement" of a paper is one thing and the "filing" of it is another.

The case of Phillips *vs.* Beene's Administrator, 38 Ala., 248, is very instructive. The Code required that the verification of a class against an insolvent estate must be filed. The Court said:

These authorities show conclusively, that a paper, not brought to the notice of the proper officer, and placed in his custody, cannot be said to be filed. As was said in the case of Holman *vs.* Chevaillier (*supra*), where the law requires or authorizes a party to file a paper, it simply means that he shall place it in his official custody. That is all that is required of him. The party cannot be prejudiced by the omission of the officer to endorse the paper filed.

In First National Bank *vs.* Hatfield, 55 Pac. Rep. 932 (Wash. 1899), an appeal was taken on April 6 and the bond was received by the clerk on April 8, but was not marked "Flled" until the 12th, owing to failure to pay filing fee until then. Held substantial compliance with statute requiring filing.

Again, in Watkins *vs.* Bugge, 77 N. W. Rep. 83, it is said the proper filing of a mechanics' lien consists in placing the sworn statement in the custody of the proper officer.

Or as was said in Brooks *vs.* Nevada, 52 Pac. Rep., 575, "The filing contemplated by the statute is the actual "delivery of the notice to the clerk, and the placing "thereon of the proper indorsement. *It must at least be "actually delivered to the clerk.*"

To same effect Townsend *vs.* Sparks, 27 S. E. Rep., 801.

C.

THE STATUTE OF JEOFAILS IS APPLICABLE IN THIS CASE.

To prevent the sacrifice of rights to constructions so technical as adopted in this case, Sec. 32 of Judiciary Act of 1789 (*Sec. 954 of the Revised Statutes of the United States*), was enacted, which is as follows:

"No summons, writ, declaration, return, process, judgment or other

" proceeding in civil causes, in any Court of the United States, shall be
" abated, arrested, quashed or reversed for any defect or want of form ;
" but such Court shall proceed and give judgment according as the
" right of the cause and matter in law shall appear to it, without
" regarding any such defect, or want of form, except those which, in
" cases of demurrer, the party demurring specially sets down, together
" with his demurrer, as the cause thereof."

Mr. Justice STORY, in *1st Gallison, at page 22*, in applying this statute, says of amendments in Appellate Courts :

" The language of this section is sufficiently comprehensive to
" sustain the app'ication for amendments in any cases before the
" Court ; but it has been attempted to be restricted to causes of
" *original*, and not to be extended to causes of *Appellate* jurisdiction.
" But we find no such distinction in the statute ; and even in Appellate
" Courts, proceeding according to the course of common law, defects
" apparent upon the record may be amended, when they come within
" the general purview of statutes."

1st Gallison, Rep., pp. 22, 23.

In *Warren* vs. *Moody*, *9 Fed. Rep., 673*, PARDEE, C. J., in construing this statute, says :

" It (the case) came up for hearing at last term, when an amendment
" of substance was allowed to the original bill, and the cause continued
" to allow the defendant to meet the amended bill by motion to strike
" out or answer or pleas, as counsel might advise. The defendant moves
" to strike out the amendment, and this motion presents the question
" whether it is allowable on appeal in equity to permit amendments to
" pleadings "

In *Kennedy* vs. *Georgia State Bank*, *8 How. 610*, it is said :

" There is nothing in the nature of an Appellate jurisdiction, pro-
" ceeding according to the common law, which forbids the granting of
" amendments. And the thirty-second section of the judiciary Act of
" 1789 (now Rev. St. Sec. 954), allowing amendments, is sufficiently
" comprehensive to embrace causes of Appellate as well as original
" jurisdiction "

So also Sec. 1005 of the Revised Statutes provides for amendments of writs of error.

It is to be noted that a writ of error can be amended in all particulars of form, and particularly "if the defect can be remedied by reference to the accompanying record."

Our contention is that the accompanying record shows the writ was lodged, and that the writ could have been amended in the particular of the file mark, if the Court thinks the file mark necessary.

Under this Statute of Jeofails the omission of the endorsement of filing should have been overlooked, or the clerk of the Circuit Court permitted to make the same as of the time he received the writ.

The judgment appealed from was rendered October 17th, 1895 (see Record, p. 92).

The writ of error bears date December 14, 1895 (see Record, p. 395), and was received by the clerk the same day (Record, p. 400), and was returned January 4th, 1896.

D.

THE CONTENTIONS OF THE DEFENDANT IN ERROR ON THIS POINT ARE UNSOUND.

1. The defendant in error has argued, Circuit Court of Appeals dismissed the writ on the ground that there was *no evidence* that the writ of error had been *filed* in the Court below.

The prevailing opinion of Ross, J., is not clear as to the *precise* ground of dismissal, but apparently holds that the writ was not *filed* in the Court below, though not defining in what *filing* consists.

The Court says: "It is quite evident, we think, from

" this affidavit * * * that the actual fact is not incon-
" sistent with the record as presented, which fails to show
" that the writ of error was there filed."

" It is urged on behalf of the plaintiff in error that, as
" the original writ was left or lodged with the clerk, it
" was, in legal effect, filed in the Court; that the indorse-
" ment is but the evidence of the filing; and that, as the
" original writ was, in fact, left or lodged with the clerk,
" it was as much filed in the Court as if it had been in-
" dorsed as filed by him."

" It may be, as already observed, that the indorsement
" of the clerk may not in all cases be essential to consti-
" tute a 'filing.' The writ of error, however, is the writ
" of the Appellate Court, and must be sent up with the
" record to this Court. It does not remain in the lower
" Court, and itself become a part of the files of that Court.
" Unless it is actually filed, and thus becomes a part of
" the record of the lower Court, there would remain in that
" Court no record whatever of such a writ, and nothing to
" show any transfer of jurisdiction from the trial to the
" Appellate Court; and, when it reaches the latter Court,
" it would contain no evidence whatever of the fact essen-
" tial to confer jurisdiction upon the Appellate Court.

" We are of opinion that, by reason of the failure to
" file the writ of error in the Court below, this Court is
" without jurisdiction of the same. Writ dismissed."

76 Fed. Rep., 620.

It is to be noted that the Court says:

Unless it is actually filed, and then becomes a part of the record of the lower Court, there will remain in that Court no record whatever of such a writ, and nothing to show any transfer of jurisdiction from the trial to the Appellate Court; and when it reaches the latter Court it would contain no evidence whatever of the fact essential to confer jurisdiction upon the Appellate Court.

It is to be noted that the Court at first says that the endorsement of the clerk may not in all cases be essential to constitute a filing. The Circuit Court of Appeals therefore says that lodging the writ with the clerk is not filing and the file mark may not be essential to constitute the filing. If neither the actual lodgement of the writ with the clerk nor the endorsement of the papers filed constitute the filing, it is somewhat difficult to understand just what in the opinion of the Court does constitute filing.

The Court says: "That unless the writ is filed, and "thus becomes a part of the record of the lower Court, "there would remain in that Court no record whatever of "such a writ, and nothing to show any transfer of juris-"diction from the trial to the appellate Court."

Now what are the facts? There is no dispute but that the original writ was lodged with the clerk of the Court below. The certificate of the clerk certifies that the transcript of the record is a correct copy of the record papers of all proceedings had in the foregoing entitled cause as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitutes the return to the annexed writ of error.

Amongst these papers are copy of a bond on the writ of error reciting that the defendant has obtained from the Court a writ of error, also a copy of a citation which recites that the writ of error was filed in the clerk's office, also a copy of the writ of error. The bond on the writ of error, the copy of the citation, copy of the writ of error, all remain of record in the lower Court and they show in that Court completely the record of such a writ.

There is abundant evidence therefore by the lower Court showing the transfer of jurisdiction from the trial to the appellate Court. The record in question when it reached the appellate Court contained, as we claim, abundant evidence of the filing of the writ of error.

2. The defendant has argued that the affidavits presented cannot be considered, nor the recitals in the citation, nor the return of the clerk.

The defendant in error has cited Hudgins *vs.* Kemp, 18 How., 534. In that case a motion was made to dismiss an appeal on the ground that none had been regularly taken. Certificates and statements of the clerk outside the record and given since it was certified and transmitted to the Supreme Court were filed as evidence of the irregularity of the removal. The Court held such evidence inadmissible and said : " The record transmitted to this Court, " certified by the clerk of the Circuit Court, states that " the appeal was taken in open court. This is sufficient " evidence of that fact * * *." And the motion is made to dismiss the case not for any irregularity apparent in the record but by testimony *aliunde* offered to show that the transcript is incorrect. It is quite clear that such testimony cannot be received to support this motion.

It appeared in the Hudgins case that the certificate of the clerk was looked into by the Court for the purpose of supporting the regularity of the proceeding. The objection was that the entry on the minutes and on the order book required that the bond on appeal should be approved by the Court, but that the approval was by a Judge out of Court and therefore insufficient. For the purpose of determining this question the Court looked into the certificate of the clerk and found that the clerk had no authority to make the entry that the bond should be approved by the Court, and as approval by a Judge was sufficient the Court held the objection untenable. The Court says :

> " But the appellant had legal rights, and he cannot be deprived of " them by any irregularity in a clerical entry * * * * Such were " the legal rights of the appellant when he made his appeal and he can- " not be deprived of them by the form adopted by the clerk in enter- " ing it."
>
> " The act of March 3, 1803, which authorizes the appeals, provides

"that they shall be subject to the same rules, regulations and restric-
"tions as are prescribed by law in cases of writs of error. And in the
"case of Innerarity *vs.* Byrne, 5 How., 295, where the record trans-
"mitted to this Court did not show that a citation had been issued and
"served, it was held to be no ground for dismissing the case, and that
"the fact might be proved *aliunde*. It is not necessary that all of the
"steps required to give this Court jurisdiction should even be on file
"in the Court below, and certainly need not appear to be of record in
"that Court. (Masten *vs.* Hunter, 1 Wheat., 304)

"We think it evident, therefore, that the want of record evidence
"in the Circuit Court that the appeal was prayed, would be no ground
"of dismissal; and that the certificate of the clerk that it was so
"prayed, is all that is required in this Court."

The language of Lord MANSFIELD is applicable to this point. In Hart *vs.* Weston, 5 Burr, 2588, he says:

"It is making the practice of the court chicane, and an elusion of
"justice, instead of being a method of coming at right. I wish gen-
"tlemen would tell their clients that objections of this sort ought not
"and cannot prevail"

Or as was said by a modern Court of a similar point on pleading, it "is so dry and technical that it rattles as we write down the point" (Watkins *vs.* Bugge, 77 N. W., 84.)

POINT II.

The true construction and effect of the New York statute is that it does not require notices to be sent where premiums are demanded to be paid without the State of New York. As the Phinney premiums were demanded to be paid only in the State of Washington, it is immaterial, therefore, whether the statute was incorporated into the policy or not, either expressly or by implication.

"Assignment errors, I, Rec., pp. 366, 367: II, Rec.

pp. 367, 368; III, Rec., pp. 368, 369; IV, Rec., pp. 369, 370; V, Rec., p. 370.

1. *There is in the language of the act no basis for a distinction between domestic and foreign companies.*

2. *The act so far as it relates to foreign corporations must necessarily be limited in its operation to the collection of premiums in the State of New York.*

3. *Hence as a common rule is prescribed, the operation of the statute as to domestic companies is likewise limited to the collection of premiums in New York State.*

4. *The clause in the policy that "this policy is a "contract, made and to be executed in the State of New "York, and shall be construed only according to the char- "ter of the Company and the laws of that state," has no bearing on the question of the necessity of notice under the statute of 1877.*

5. *The statute of 1877 has never been construed by the Courts of New York to require notices to be sent outside New York State, and hence this Court should not so construe it. The Courts of other States have never decided this.*

6. *There is no statute or public policy in the sovereign State of Washington which demands the construction contended for by respondent.*

7. *The cases cited by the respondent in support of their construction of the statute of 1877 are either not well considered, or do not support respondent's contentions, which latter are not well founded.*

8. *To adopt the construction contended for by defendant in error would be "judicial legislation" of the most extreme type.*

9. *The practical effect of the construction contended for by plaintiff in error shows that such is the true construction.*

A.

THE STATUTE APPLIES ONLY TO THE BUSINESS OF COLLECTING PREMIUMS WHICH IS DONE IN NEW YORK, IN WHICH CATEGORY THE PHINNEY CASE IS NOT INCLUDED AND THE STATUTE IS ENFORCEABLE ONLY IN THE STATE OF NEW YORK BY THE COURTS OF NEW YORK.

PRELIMINARY STATEMENT.

The statute of New York in question is to be found in the Appendix hereto.

By the contract the premiums were payable in New York, but it was expressly provided that the premiums would be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary (Rec. 3). But premiums on Washington policies were always accepted there, Stinson being the subagent and State General agent for that purpose (Rec., 248, 249, 250). The renewal receipts were sent in in advance from New York (Rec., 251, 259, 260, 313).

The main reliance of the defendant in error is upon Carter *vs.* Brooklyn Life, 110 N. Y., 18, *but in this case the premiums were demanded to be paid in New York*, and the case sustains the contention of the plaintiff in error.

In the Carter case, after the passage of the Act of 1876, the plaintiff remitted premiums directly to the company at New York, and the controversy was simply over whether the notice was sent to the right address.

The Brooklyn Life was a *domestic* company, and the case shows the operation of the statute as to domestic companies.

The case of De Frece *vs.* National Life, 136 New York, 144, shows the operation of the statute as to *foreign* companies.

The National Life was a Vermont corporation. The

company had a general agent in New York, and the notice was mailed in New York and the premium was payable there.

The position taken by the defendant company may be illustrated as follows:

Strictly speaking, the life of the juristic person known as the Connecticut Mutual for example ceases at one of the points at which the power of the Connecticut Legislature ceases, *i. e.*, at the New York boundary line, but New York permits this artificial creation to do business in New York on the terms amongst others that it send notices to insured or assignees where premiums are demanded to be paid in New York and the same law in the same terms regulates domestic companies. When the Connecticut Mutual for example enters the State of Washington to do business, it finds no similar law there and is under no obligation to send notices to persons like Phinney residing there, and the foreign juristic person, the Mutual of New York is in the same case. What basis then is there for the Washington Circuit Court to extend the operations of the New York statute extra-territorially as to the Mutual Life of New York when it cannot do so as to the Connecticut Mutual for example. The New York Courts have not bound it, as a matter of comity, to do so. There is no public policy in the State of Washington requiring it. There is no contract between the parties requiring it. On the contrary the parties have waived it, if it ever existed.

This regulation is a matter for separate legislation by each sovereign State.

The sovereign State of Washington has not so legislated, and the plaintiff in error contends that the sovereign State of New York in legislating in the same terms as to foreign and domestic companies, has indicated its intent that its legislation shall affect both alike, and that it did not intend to discriminate against its own citizens.

The operation of the statute is limited by its true construction to dealings with policyholders whose premiums are demanded to be paid in New York just as much as if it expressly read that the notices were to be sent only when premiums are collected in New York. In such case it would be entirely immaterial where the contract was made, and consequently from that point of view what was the proper law of the contract, or whether the business of insurance was originally done in New York.

And that is what the plaintiff in error shows in this point.

The only judicial opinions wherein the above contention is considered are the opinion of HANFORD, J., on the plaintiff's demurrer to the defendant's answer herein (reported in 67 Fed. Rep., 497), and the opinion of the Supreme Court of Washington in the case of Griesemer *vs.* Insurance Co., 10 Washington, 202, *and both opinions concede the principle contended for, viz., that the statute must have the same effect both as to domestic and as to foreign companies*, but claim that the statute applies *to business done in New York*, and that the transactions in question are "business done in New York."

The opinion of HANFORD, J., states as follows:

> "The law of New York, by its terms, *applies to all life insurance companies transacting business in that State.* It is contended that this statute, if it is made to apply to contracts of life insurance entered into outside of the State, is unconstitutional, because it will not operate equally upon all life insurance companies doing business in New York; that the Legislature has not the power to prescribe an obligation of this kind to affect a Connecticut Life Insurance Company doing business in New York and also doing business in the State of Washington, as regards the contracts of the Connecticut company made in Washington, and that, therefore, a home company would be placed at a disadvantage, as compared with a company of a different State, transacting business in New York. I think that argument is based upon false premises. *I think that the binding force of the statute applies to all companies equally.*

B.

The true construction of the New York statute is that that statute only required the notice to be sent to the insured, or assignees, whose premiums were demanded to be paid in the State of New York, and therefore it is immaterial whether the statute is incorporated into the contract or not, either expressly or by implication.

The question is, what does the Act of 1877 mean, and what basis exists in it for giving it one effect as to *domestic* corporations and another effect as to *foreign* corporations.

The Legislature of New York had full power over the subject and *could* have made one rule for domestic and another for foreign companies. It *could* have passed a law as to collection of premiums and post office addresses outside the State of New York, which would follow the domestic company everywhere, and made another rule applicable *only* to foreign corporations and to collection of premiums in New York State. The question is, did it do so?

The plaintiff in error claims that the Legislature made no distinction between domestic and foreign companies, but laid down a rule common to both alike, intended to govern collection of premiums in New York State only.

1. THERE IS IN THE LANGUAGE OF THE ACT NO BASIS FOR A DISTINCTION BETWEEN DOMESTIC AND FOREIGN COMPANIES.

The act in specifying companies to which it applies, names life insurance companies, but does not say, all domestic companies, and also all foreign companies doing business in New York, thus making a distinction between domestic and foreign companies as to the application of the act.

But it does apply one limitation, namely, "doing busi-

ness in the State of New York," and the subject matter of the act being the collection of premiums and notices the "business" referred to must relate to insured, or assignees, whose premiums are collectable there, leaving the insured or assignees, who pay their premiums in other States to be protected in the wisdom of the Legislatures of such other States. The legislative language in other statutes in New York State is different where an act is to apply to all domestic companies, governing their action everywhere, and also to all foreign companies doingbusiness in that State.

2. THE ACT, SO FAR AS IT RELATES TO FOREIGN CORPORATIONS, MUST NECESSARILY BE LIMITED IN ITS OPERATION TO THE BUSINESS OF COLLECTING PREMIUMS IN NEW YORK STATE.

It will not be pretended that it could be claimed in a Court in the State of Washington in a suit there against the Connecticut Mutual, for example, although it was doing business in New York, that it had not sent notice of a premium collectible in Washington. This shows that the phrase, "doing business in the State of New York," is not to be interpreted in every forum to classify all corporations into those doing business there in the sense of the business of insuring, and those not doing business there, making the former subject to the act and the latter not, but as pointing out the insured or assignees whose premiums are collectible in New York, as the persons to be protected. The "business" referred in the statute as transacted within the State of New York is the collection of premiums in New York State.

The Connecticut Mutual is "doing business in the State of New York," and yet it has power to forfeit policies, but not as against insured or assignees paying premiums in New York, unless notice is sent in conformity with the statute.

In the case of Phelan *vs.* Northwestern Life, 113 New York, 147 (1889) the case was that of a *Wisconsin* company, and the Court said it was "doing business in New York." It appears also that the *policyholder resided in New York*, and the controversy was over the proper mailing of a proper notice to him *there*.

We are not concerned with what the New York Legislature *might* have done, or *should* have done, nor is the Federal Court legislating in the place of the Washington Legislature, but we are concerned simply with what the New York Legislature *has* done.

By introducing foreign companies into the Act in respect to which the Legislature had power only as to collection of premiums in New York State, the Legislature indicated that it was dealing with the territorial limits of that State, and so far as all companies did the business of collecting premiums there, foreign or domestic, they must do it as prescribed by the act.

If the act had applied expressly and solely to domestic companies an entirely different question might be presented.

The defendant in error refers to the surrender value statute of New York, but that statute is wholly dissimilar in that it expressly refers and is limited to "Any policy of life insurance issued by any *domestic* life insurance corporation." There is no question on that statute as to the extent to which it applies to *foreign* companies.

The statute for New York relating to surrender value of lapsed or forfeited policies was passed in 1879 (L. 1879, Ch. 347), and the material part was as follows:

"Whenever any policy of life insurance issued after January first, eighteen hundred and eighty, by any domestic life insurance corporation after being in force three full years, shall, by its terms, lapse or become forfeited for the non-payment of any premium or any note

given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American experience table of mortality at the rate of four and one-half per cent. per annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount, so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid up insurance payable at the same time and under the same conditions, except as to payments of premiums as the original policy."

What is the operation of the premium notice act upon foreign companies? *Its operation must necessarily be limited to the territorial limits of New York State. The only proper subject matter of legislation as to collection of premiums by foreign corporations is collection and notice thereof in New York State* The New York Court of Appeals in holding that the provisions exempting religious, charitable and other corporations named in the Inheritance Tax Acts applied only to domestic corporations has said: "The law of this State cannot enlarge or change the powers of a foreign corporation. They are solely those given by the law of the domicile. Foreign corporations are permitted by comity to exercise their powers within this State, when not in contravention of our statutes or public policy."

In re Prime's Estate, 136 N. Y., 359.
Matter of Merriam, 141 N. Y., 484.
Matter of Ballcis, 144 N. Y., 134.

The Statute of 1877 is to be construed as to foreign corporations in the light of these principles. The statute was not enlarging or changing powers of foreign companies. It was regulating a class of business transacted *within the State* of New York, by domestic and foreign companies alike, to wit: that of collecting premiums on policies of life insurance. Thus the Ohio Court in the American Bible Society *vs.* Marshall, 15 O. S., 543, held that the New York statute of wills providing that "no devise of real estate to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise," had no effect beyond the limits of New York State. "It is not to be presumed," says the Court, "that the Legislature of that State intended to go further." And it was held that the Bible Society could take lands by devise in Ohio.

The New York Legislature did not intend that foreign companies should send notices of premiums payable everywhere. All that the statute declared was a rule of conduct in New York State, in favor mainly of its residents. No more did it intend that domestic companies should send the notices of premiums collectible everywhere. There is no intimation in the Act as to any difference in its operation as between foreign and domestic companies.

Realty Co. vs. *Appolonio*, 5 *Wash. Rep.*, 437.

3. HENCE AS A COMMON RULE IS PRESCRIBED, THE OPERATION OF THE STATUTE AS TO DOMESTIC COMPANIES IS LIKEWISE LIMITED TO THE COLLECTION OF PREMIUMS AND NOTICE THEREOF IN NEW YORK STATE.

The above reasoning as to the construction of the law of 1877 is fully supported by the New York Courts in the leading case of Vanderpoel *vs.* Gorman, 140 N. Y. 563, where the Court construed a New York statute providing that no corporation should make any transfer or assignment in contemplation of insolvency, and held that *it applied to domestic companies alone.* The Court said:

"There is nothing in the section limiting its scope and effect to "such property as the foreign corporation might have within this State. "It is a broad enactment affecting every assignment made by a cor- "poration under the circumstances mentioned. Can it be supposed "that the Legislature had in mind a foreign corporation and intended "to assume a jurisdiction to declare such an act, even when done out- "side this State, and in respect to property also outside of its boun- "daries, to be void and of no effect? This cannot be supposed, for "we cannot impute to the Legislature such ignorance upon the subject "of its inability to give extra-territorial effect to its own laws. And "if it had foreign corporations in mind when proposing to legislate "upon the subject, and knew it could not affect the validity of such "transfers outside this State, and intended to provide that such trans "fers should not carry the title to property of the corporation held "within this State and subject to our jurisdiction, it must be clear "that language somewhat appropriate to express such purpose would "have been used. The language actually used was neither apt nor "pertinent for this purpose. It is both appropriate and pertinent when "applied to domestic corporations only."

In the case at bar foreign corporations were expressly included by the same terms as domestic companies, and as the Legislature must have intended to limit the operation of the statute as to foreign companies (see reasoning in Vanderpoel *vs.* Gorman) it must have had the like intent as to domestic companies.

So in an analogous case, Bank of Louisville *vs.* Young, 37 Mo., 407, the Court said: "That it was not intended to "place corporations on a different footing from indivi- "duals in regard to extra-territorial contracts." Similarly as we have argued, there is nothing in the act of 1877 tending to show that it was intended to place foreign and domestic companies on a different footing as to extra territorial business. To the same effect Judge DENIO in Bard *vs.* Poole, 12 N. Y., 503.

application

4. THE CLAUSE IN THE POLICY THAT "THIS POLICY IS A CONTRACT, MADE AND TO BE EXECUTED IN THE STATE OF "NEW YORK, AND SHALL BE CONSTRUED ONLY ACCORDING

"TO THE CHARTER OF THE COMPANY AND THE LAWS OF THAT STATE," HAS NO BEARING ON THE QUESTION OF THE NECESSITY OF NOTICE UNDER THE STATUTE OF 1877.

The point is, What is the meaning of the statute? If it means as we contend that a common rule shall apply to domestic and foreign companies as to premiums collectible in New York State and not elsewhere, then it is immaterial whether the effect of this clause is to incorporate the statute or not. If it means as defendant in error contends, its incorporation is equally immaterial.

The claim that this clause made the statute applicable to Washington, when otherwise it would not have been, is preposterous. There was no agreement by this clause that what the New York law required us to do in New York alone we would voluntarily do in Washington and every other State in the Union. And yet this is what defendant in error's contention would come to.

Whether it was a New York contract or not is entirely immaterial on this point. The question whether the policy was a New York, or Washington, or Ohio or Pennsylvania contract for example is not essential from this point of view to the determination of any case.

Many Courts have held for the purpose of giving effect to foreign laws that policies have been contracts governed by foreign laws. Under such decisions these contracts might be respectively New York or Washington or Pennsylvania or Ohio contracts for example. If corporations issuing such contracts are to bear the burden of foreign laws they should also be held Washington or Pennsylvania or Ohio contracts for the purpose of having the benefit of the absence in foreign States as in such case Washington or Pennsylvania or Ohio, of special regulations as to notices.

5. THE STATUTE OF 1877 HAS NEVER BEEN CONSTRUED

BY THE COURTS OF NEW YORK TO REQUIRE NOTICES TO BE SENT OF PREMIUMS DEMANDED OR PERMITTED TO BE PAID OUTSIDE NEW YORK STATE, AND HENCE THIS COURT SHOULD NOT SO CONSTRUE IT.

This Court is called upon to decide the meaning of a New York statute.

The construction contended for by respondent would in effect be a discrimination by New York against her own companies. The presumption is that New York did not intend any discrimination against her own companies. As in an analogous case VON BAR has said: "It is impossible "to suppose that our subjects should have been intended to "be put at a disadvantage with the Fisk (fisc) of another "country" (Von Bar's International Law, 2d Ed., p. 237).

The Court of Appeals in People *ex rel.* Badische Fabrik *vs.* Roberts, 152 N. Y., 63 (1897), has declared the policy of New York State to be one of general equality as to domestic and foreign companies.

This Court should not extend the operation of the statute by the construction defendant in error demands.

Thus where the question was as to the meaning of a New York statute the Minnesota Court said that it was "not free from doubt" and "whether that is the effect of "the legislation of New York we cannot settle by any de- "cision we may make. Only the Courts of that State can "authoritatively determine. In the absence of any ju- "dicial construction of the law by the Courts of that State "or of a practical administration of it in a manner preju- "dicial to foreign corporations, our retaliatory act should "not be deemed applicable if it is felt to be doubtful how "the statutes of New York should be construed, even "though we might be of the opinion that their *probable* "effect is to restrict the operation of foreign corporations "to a narrower field than that allowed to this respond- "ent."

State *vs.* Fidelity Co., 89 Minn., 544.

There is no decision in the State of New York adverse to our contention binding this Court.

6. THERE IS NO STATUTE OR PUBLIC POLICY IN THE SOVEREIGN STATE OF WASHINGTON WHERE THE PREMIUMS WERE SOUGHT TO BE COLLECTED WHICH DEMANDS THE CONSTRUCTION CONTENDED FOR AGAINST THE PLAINTIFF IN ERROR.

A foreign company in the State of Washington is obliged to file "a certified copy of its charter, articles of "incorporation, memorandum of association or certificate "of incorporation" (Hill's Statutes, Sec, 1525). This includes, of course, foreign insurance companies, as to which there is a special provision (*Id.*, Sec. 2715).

The suggestion that the New York statute is to be considered as any part of the charter of appellant is without foundation. (As stated above, the words "has power" were stricken out in the revision of 1892 as immaterial and of no force.)

The State of Washington does not permit a foreign insurance company to transact business in Washington on more favorable conditions than are prescribed by law for domestic insurance companies (*Id.*, Sec. 1524). There is no requirement that domestic companies shall send any notices to residents of Washington, or of premiums permitted to be paid there.

The policy of the State of Washington is liberal towards foreign companies, and the construction contended for is wholly at variance with such policy, and would introduce a most unjust discrimination between New York companies and other companies in the State of Washington.

If there was any public policy on this point manifested by the statutes or decision of the State of Washington a different question might be presented.

7. THE CASES CITED BY THE DEFENDANT IN ERROR IN SUPPORT OF THEIR CONSTRUCTION OF THE STATUTE OF 1877 ARE EITHER NOT WELL CONSIDERED, OR DO NOT SUPPORT HIS CONTENTION.

In the case of Griffith *vs.* New York Life Insurance Company, 101 Cal., 627, the Court entirely fails to perceive the scope of the act, and that domestic and foreign corporations are placed on the same basis. It appears, however, that the premiums were payable in New York. That Court begged the question when it stated "the statute is a limitation on the power of the company, etc.." The question is not whether it is a limitation on the power, but what is the extent of the territorial operation of the statute. The extent is the same as to domestic and foreign, *i. e.*, business of collecting premiums in New York State.

The defendant in error has claimed: "Does the State "of Washington, when, as a matter of courtesy to other "States, she permits the insurance corporations of such "States to come within her boundary to trade with her "citizens, permit them to come in like freebooters?"

Certainly not; but, according to the respondent, the Equitable, the New York, the Mutual, would be "freebooters," unless their construction prevails, while the Connecticut Mutual, the Northwestern Mutual, the Provident, the New England Mutual would at the same time, we suppose, not be "freebooters."

Why the Court should be urged to be astute to legislate against New York companies in favor of Massachusetts, New Jersey and Wisconsin companies one can hardly see. For this statute imposes a technical burden of labor and expense, and one wholly unnecessary, for the substance of it is voluntarily assumed by companies, and it is for Legislatures to impose it, if at all.

The law cannot under any construction be made by the

Court to apply to companies chartered outside of New York, who collect premiums in Washington. What object, then, to turn and twist the statute so as to operate against New York companies alone? It is for the sovereign State of Washington to protect her residents by legislation against all foreign corporations.

The words "have power to" in the first section of the Act of 1877 are of no special force or meaning. *They were stricken out in the revision of 1892 and do not now appear in the law.*

Hebb *vs.* Insurance Co., 138, Pa. St., 174, is manifestly obscure bad law, and the construction of the Pennsylvania statute is an instance of flagrant judicial legislation, unsupported by any reasoning whatever. The statute reads "that all life and fire insurance policies "upon the lives or property of persons *within* "*this Commonwealth*, whether issued by companies "organized under the laws of this State, or by "foreign companies doing business therein." The property was in West Virginia. The decision is sound only in case the insured resided in Pennsylvania. And if so the cause is really authority for our contention notwithstanding the erroneous general language of the Court. The life or property or person insured must reside in Pennsylvania. The Pennsylvania Act is really based on the same general lines as those on which we contend our New York statute is based, namely a common rule applicable to foreign and domestic companies exactly alike. Spokane, etc., Lumber Co. *vs.* McChesney, 1 Wash. Rep., 609, declares that the decision of another State construing a statute contrary to its plain import will not be followed in construing a similar statute subsequently enacted here.

In the Ficklin case (Insurance Co. *vs.* Ficklin, 74 Md.) the statute expressly applied to all policies of domestic companies, and there was no question whatever as to

the scope of the statute as between foreign and domestic companies.

In the case of Washington Bank *vs.* Hume, 128 U. S. 195, the Connecticut statute which related to the rights of married women regulated this natute of the contract and applied to "any policy of life insurance," and the company itself printed the statute on the policy.

In Warner *vs.* National Life Association of Hartford (100 Mich., 157), the Michigan Court is deciding in reference to a contract made by a foreign corporation (foreign both to New York and Michigan) in the State of New York, and governed by the laws of that State, as the Court holds. It appears from the report of the case that the insured evidently resided in New York State, the notice sent was mailed to his address in New York State.

Courts of States other than New York have erroneously held the premium notice statute applicable to New York Companies on the broad ground that the particular policies were New York contracts or that the business of insurance was done in New York.

This construction is impracticable and unreasonable. (See 9 below.)

It is submitted that in view of the foregoing argument the test of the operation of the statute is not the answer to an inquiry as to what is the proper law of the contract, or whether the business of insuring was done in New York in the sense that the contract was made there, but where were the premiums sought to be collected or permitted to be paid?

In the case of Equitable Life *vs.* Nixon (81 F. R., 796) the statute was held applicable by Federal *Court in Washington* on the ground that policy was a New York contract, and the point here discussed was not in any way raised. The Trimble case (55 Pac. Rep., 429) simply followed this. In the Trimble case the notice mailed *required*

payment in New York City. The same is true of the Provident Life *vs.* Nixon (44 U. S. App., 318) when there was no discussion whatever of the point, but the notice was mailed in New York City and required payment in New York City.

In the Mullen case, 89 Texas, 261, the Phinney case was expressly followed, the Court only saying: "We think the "provisions of New York statute, *under the facts* shown "in this case, entered into and became a part of the contract "between the parties."

In the Griffith case, 101 Cal., 627, the statute was assumed to apply as the premiums were payable in New York and there was no discussion whatever on the subject.

In the case of Goodwin *vs.* Provident Life, 66 N. W., 157, the Court held the contract a New York contract, and the *statute* was conceded by counsel to apply. The same is true of N. Y. Life *vs.* Smith, 41 S. W., 680.

Courts of States other than New York have also erroneously held the premium notice statute applicable to companies foreign to New York, on the broad ground that the particular policies were New York contracts, or that the business was done in New York.

This construction is impracticable and unreasonable (see 9 below).

The Court of Michigan in Warner *vs.* Association, 100 Mich., 157 (1894), held a premium notice law of New York applicable to a Connecticut company because as it alleged the contract was made in New York ,but the notice was mailed to New York.

The defendant in error attempted to support its construction of the statute in the Court below in part by the following propositions:

(1.) "It is of quite as much importance that a policy-"holder in Washington should have timely notice and "warning as a like policyholder in New York." But

there may have been some considerations which appealed even more strongly to the New York Legislature, as, for example, the burden which would thus be thrown upon companies in the way of a precise following of the statute, and the record of affidavits and all the machinery of the act to be set in motion in many different States, with the only result that the statute would be a trap for the companies, to be mulcted in large sums for which no consideration is given, and where no insurance is intended, or believed to continue to exist by either party as in this case. The fact that the Legislature included *foreign* companies is decisive that whatever may have been its motive it intended the statue to be operative only in New York State. It is well known that insurance oompanies send several notices to all policyholders. This is because it is in the interest of a company that its insurance should not lapse. But it is a different thing to impose a technical statutory burden and enable speculative claims for insurance to be enforced without consideration.

(2.) "Would it be fair to the vast army of the policy-"holders * * * to pass laws for the protection of "only its own residents?" This question involves only a partial view of the interests of policyholders. The United States is filled with insurance corporations. Competition is keen, necessary expenses are large, though relatively small to the business done. New York State cannot be presumed to have intended a heavy burden on the policyholders of its companies which it could not impose upon policyholders of foreign companies. New York said we will cast additional protection around all New York policyholders, for they are in the main those whose premiums are collectible there, foreign and domestic, without discrimination as to protection or expense. And we will regulate the business of collecting premiums in the State of New York.

(3.) Insurance companies ever since the statute was "enacted have so understood the law and complied "therewith."

There is no proof of this in the record. It is not true. What is true is that policyholders have always been dunned with notices to pay premiums. The successful progress of a life insurance company depends on its insurance staying. The effort of companies lies in the direction of holding business and using every effort to do so. It is, and has been for years, the practice of all companies to send "first notices," "second notices," "default notices," "renewal notices," and urge policyholders to continue their insurance. The evils of forfeiture have been remedied by surrender value laws. The important remedy applied has been to relieve against the *effects* of forfeiture, not to prevent its taking place. This case and the batch of cases now here pending on application for *certiorari* indicate clearly that the claims presented are not based on an unreminded forgetfulness of a policyholder, but on attempts to obtain a construction of a statute which will, through its alleged violation by the companies, result practically in insurance by paying premiums *after death*.

8. To ADOPT THE CONSTRUCTION CONTENDED FOR BY DEFENDANT IN ERROR WOULD BE "JUDICIAL LEGISLATION" OF THE MOST EXTREME TYPE.

Judicial legislation is substantially equivalent to a Court exercising legislative functions.

The construction contended for could not be upheld without sanctioning judicial legislation, against which this Court has often pronounced itself.

9. THE PRACTICAL EFFECT OF THE CONSTRUCTION CONTENDED FOR BY PLAINTIFF IN ERROR SHOWS THAT SUCH IS THE TRUE CONSTRUCTION.

The statute imposes the duty of sending notices. The presumption is that the Legislature intended that such duty could readily be ascertained. The companies both foreign and domestic who have policyholders whose premiums are collectible in New York on whose part offices and addresses are there, are under the construction contended for, easily able to distinguish such policyholders and keep proper lists of the same.

But if the duty to send notices only exists in cases where the contracts are New York contracts, and where the statute of New York is the proper law of the contract, or when the business of insurance can be said to have been done in New York, then a duty is imposed impracticable of fulfillment. How can a domestic company, and still less how can a foreign company, readily or at all classify its contracts on this basis, for the purpose of sending notices? The canon of construction is that statutes must have a reasonable construction.

Point III.

UNDER THE CIRCUMSTANCES SURROUNDING THE APPLICATION FOR INSURANCE, AND DELIVERY OF THIS POLICY IN THE STATE OF WASHINGTON, IT WAS A WASHINGTON CONTRACT AND UNDER THE PRINCIPLES GOVERNING THE APPLICATION OF THE STATUTES OF A PARTICULAR STATE TO A PARTICULAR CONTRACT, THE NEW YORK STATUTE WAS NOT APPLICABLE TO THIS POLICY.

It has been shown before that the true construction of this statute is that it requires notices to be sent only

of collections in New York State, or applies only to business of collecting done in New York, or is enforceable only by the Courts of New York. It is immaterial therefore whether that statute is the proper law of the Phinney contract or not, as Phinney was not a resident of New York, the business of collecting was not done there, and the suit was not in a New York Court. But it is also manifest that

(A.)

The proper law of the Phinney contract was the law of Washington which required no notice.

(B.)

The statute of 1877 is no part of the charter of the plaintiff in error, or a limitation on its power to contract.

(A.)

The proper law of the Phinney contract was the law of Washington which requires no notice.

Assignment Errors VIII Rec., p. 373.

This question was raised by numerous requests for instructions to the jury, properly submitted to the Court below, and refused, and by exceptions taken to the instructions given by the Court to the jury, upon which error has been duly assigned, and the errors claimed are fully set out in Specification of Errors, paragraphs, I, II, III, IV, V, VII, XXII, XXIII and XXVI.

The theory upon which plaintiff in error tried the case, in so far as this point is concerned, was that the contract was a contract made in the State of Washington, and in

no wise controlled or governed by the provisions of this New York statute. The Court adopted the theory diametrically opposed to this, and instructed the jury, in effect, that the contract was a New York contract, and subject to the same statute as though made in New York with a citizen and resident of that State. If the contract is a Washington one, then the premium notice law does not apply. For, as was said in Equitable Life *vs.* Nixon, 81 F. R., 798, "In the State of New York, there is "such a statute, and hence the principal question in the "case is whether the policy in suit was a New York con- "tract, and to be ruled in accordance with the statute of "that State, or to be governed by the principles of the "common law, which are in force in Washington in re- "spect to such contracts of insurance."

There is no dispute between the parties as to the manner of the making of the contract. It is a conceded fact that the application for the policy was made by the insured, a resident of the State of Washington, to a local agency in that State; that this application was forwarded to the General Agent for the Pacific Coast at San Francisco, and by such General Agent to the home office of the company at New York; that a policy was issued from the home office, forwarded to the General Agent at San Francisco, and by him transmitted to the local agent at Seattle *to be by him delivered to the applicant upon payment of the premium there;* that this local agent delivered the policy to the insured at Seattle, *and there collected from him the premium.* The application contained these words:

"The contract * * * *shall not take effect until the first premium shall have been paid* and the policy shall have been delivered during my continuance in good health."

It is settled by the great weight of authority that a policy of a company incorporated under the laws of one

State and doing business in another, applied for and delivered under circumstances such as are stated above, to the insured, a resident of the latter State, where the premiums are paid, is a contract of the State of the residence of the insured and governed by the laws thereof, *even in cases where the policy itself provides that it shall be governed by the laws of the State where it is issued.* The making of such a contract is business done in the State of its delivery, and not in the State where it was issued.

Ins. Co. *vs.* Clements, 140 U. S., 226.
Ins. Co. *vs.* Berry, 50 Fed., 511; 1 C. C. A., 561.
Ins. Co. *vs.* Robinson, 54 Fed., 580: affirmed, 58 Fed., 723; 7 C. C. A., 444.
Hicks *vs* Ins. Co., 60 Fed., 690; 9 C. C. A., 215.
Thwing *vs.* Ins. Co, 111 Mass., 93.
Heebner *vs.* Ins. Co., 10 Gray (Mass.), 131
In re Breitung's Estate, 46 Northwestern, 891 (Wis.).
Hurst *vs.* Life Ins. Co. (Md.), 26 Atlantic, 956, 958.
Ins Co. *vs.* Sawyer, 160 Mass, 413.
Equitable Life Ins. Co. *vs.* Winning, 58 Fed., 541; 7 C. C. A., 359.

A reference to the above adjudications will clearly demonstrate that whenever insurance companies have attempted to import into such contracts, *for their benefit and advantage*, that is in the case of such a mutual company as this for the benefit of the whole body of policy holders, the laws of their own States, the Courts have invariably and without exception refused to apply such laws, and have applied the laws of the State where the insurance was effected, the policy delivered and the premiums paid. No reason is apparent why this rule should be changed or relaxed for the benefit of the insured, especially in a case like this, where the representative of the alleged insured is seeking a benefit and advantage which she could not obtain under the terms of the contract, and under the laws of her own State.

We respectfully insist that the construction of this con-

tract in this respect is governed by the facts attending its execution, uninfluenced by any consideration as to whether the insurer or the insured may be benefitted thereby. We can say of this contract as did the Supreme Court of the United States of the contract in the Clements case above cited that upon this record the conclusion is inevitable, that the policy never became a completed contract, binding either party to it, until the delivery of the policy, and the payment of the first premium in Washington, and consequently, the contract is a Washington contract and governed by the laws of Washington.

In the case of Northwestern Mutual Life Ins. Co. *vs.* Elliott, 5 Fed. Rep., 228, the application for the policy was made in Oregon, the policy was forwarded to the agent in Oregon and delivered there. The Court said: "Where, "then, was this contract made, in Wisconsin or Oregon? "The answer to this question involves the inquiry, Where "did the final act take place which made the transaction "a contract binding upon the parties?

"The premium was paid to the agent of the plaintiff at "Portland, who then and there countersigned and deliv- "ered the policy. This was the consummation and com- "pletion of the contract. But, to put this beyond a doubt, "the policy itself declares that it shall not be binding "upon the company until these acts are performed. And "until it was binding upon the company it was not bind- "ing upon the applicant; in short, it was not yet a con- "tract, but only a proposition."

See also

Pomeroy *vs.* Manhattan L. Ins. Co., 40 Ills., 400.
Thwing *vs.* Great Western Ins. Co., 111 Mass., 109.
Wood F. Ins., 189 and n. 2.
Hardie *vs.* St. Louis M. L. Ins. Co., 26 La. An., p. 242.
St. Louis M. L. Ins. Co *vs.* Kennedy, 6 Bush, 450.

Upon the authority of the above case, as well as the

other cases cited, we contend that the policy in suit is a Washington contract, and that it is uncontrolled by the foreign statute and it must be effective according to the language used by the parties thereto. They having contracted that it should become void and inoperative upon a certain contingency, and that contingency having happened, the Court below committed reversible error in refusing to instruct as requested by plaintiff in error, and in instructing in effect, that the policy was a New York contract, and governed and controlled by the statute of that State, and was not forfeited by failure of the assured to pay the premiums when due.

Those cases holding policies to be New York contracts, and the New York premium notice therefore applicable, are cases where the circumstances surrounding the issuance of the policy are different from those at bar.

The broad ground upon which Courts other than those of New York State have held New York statute applicable has been that the policies were New York contracts, or business done in New York, although it is also true that in the bulk of these cases the premiums were being collected in New York. The Phinney policy was neither.

In the Nixon case (81 F. R., 796) the contract was held not a Washington contract, but a New York contract. This was based upon a "binding receipt" which did not exist in the Phinney case.

In the Phinney case, on the contrary, no money was paid at the time of application, and transmitted to New York. In the Phinney case the policy was transmitted to Washington, and upon *delivery there*, the *premium was paid there, and the policy took effect there.* The application stated, "which (the policy) shall not take effect until "the first premium shall have been paid." Under the doctrines of the Nixon case, therefore, the Phinney policy was a Washington policy governed by its laws, and the language of the Nixon case, "there is no statute of Wash-

"ington affecting that provision of the policy which de-"clares that, 'if any premium or instalment of a premium "on this policy shall not be paid when due, this policy "shall be void,'" is applicable to the Phinney policy (Record, p. 4.)

In the Equitable Life *vs.* Trimble, 83 F. R., 85, the Nixon case was followed.

In Provident Savings Life Association *vs.* Nixon, 44 U. S. Appeals, 319 (Ninth Circuit, 1896), where the opinion was delivered by Mr. Justice McKenna of this Court, no question whatever was raised except whether the proof showed the notices were *mailed.*

In Mullen *vs.* Mutual, 89 Texas, the Phinney case was simply followed.

In Griffith *vs.* New York Life, 101 Cal., 640, the statute was assumed to apply, and there was no discussion of this point whatever.

In Warner *vs.* Association, 100 Mich., 157 (1894), which was the case of a company foreign to New York, the Court simply said, "the contract of insurance was made in the "State of New York, and is governed by the laws of that "State."

In Goodwin *vs.* Provident Life, 66 N. W., 157, the Court held the contract a New York contract, *as it was agreed in the policy that it should be construed to have been made in the State of New York.* This was not so in the Phinney policy.

In N. Y. Life *vs.* Smith, 41 S. W., 680 (Texas, 1897), it was assumed that the statute was applicable.

See also the comments on the above cases in Point II.

The defendant in error, however, erroneously contends that the law of New York above recited does, notwithstanding the principles announced in the foregoing cases, govern this contract, alleging that the parties to said contract expressly agreed therein that it should so govern it.

To maintain this position reliance is placed upon the following clause in the application:

"This application is made to The Mutual Life Insurance Company, of New York, subject to the Charter of the Company and the laws of the State of New York."

The language relied on, relates in terms to the application for the policy, and not to the policy, which are two distinct and separate things.

It does not purport to be a stipulation in the application attempting to control the effect of the policy. The application is a written proposal or offer of the insured which is accepted by the issuance of the contract. It is true that it is, in this case, a part of such contract and is part consideration thereof, and stipulations therein contained purporting to limit or control the effect of the policy may have that effect.

Considered by itself, however, the application contains merely the data upon which the real contract is based.

It is not essential to the validity of the contract, and a policy is valid, though issued without it.

May on Insurance, Secs. 29, 159, 167, 168. (2d Ed.)

By reference to the other clause in the application hereinbefore quoted relating to the delivery of the policy, it will be seen, however, that this application does contain clauses purporting to control the policy, and these, as has been stated, are effectual for that purpose.

It appears that it was the express intention of both parties to this contract that while the application was made subject to the laws of New York, *i. e.*, subject to the charter of The Mutual Life Insurance Company and the laws amendatory thereof, the contract or policy issued thereon was to become consummated and in force wherever said contract should be delivered and the premium paid; and, as a matter of law, the policy was to be subject to the

laws of the place of such consummation, in this case, the State of Washington. It thus appears from the application, that while it is made subject to the laws of the State of New York, a different stipulation was inserted with regard to the policy, according to which, it may or may not, according to the place of its delivery, become a contract "subject to the laws of New York."

That the clause in the appplication, "this contract shall "not take effect until the first premium shall have been "paid and the policy shall have been delivered," is of controlling force, especially in Federal Courts, appears from the cases hereinbefore cited.

By the terms of the policy, also, it is provided, "the "annual premium shall be paid in advance on the *delivery* "of this policy." If this contract, then, is to be governed by the law of the place of the delivery thereof, as would appear from the cases above cited, then, by the express agreement of the parties, such law was to be, not the law of New York, but the law of the State of Washington.

It is also contended that the contract is governed by the laws of New York, because the loss was payable in that State; that this was the place of performance. It is clear, however, that it was the intention of both parties that so far as payment of the first premium constituted performance, performance was to be begun in the State of Washington, for the first premium was to be paid on the delivery of the policy; and it was also provided that payment of the other premiums might be made in exchange for the company's receipt at places other than the State of New York, which was the State of Washington in this case as has been shown. It is proved that the general agent at San Francisco and the local agent for Washington both sent notices to Phinney of the approaching due date of the premium, and providing for its payment in Washington, that Phinney received the notices and before the due date

negotiated with our agent Stinson in Washington with respect to the payment of the premium, in whose hands was the company's receipt for delivery upon payment.

It appears, therefore, that the place of performance by plaintiff's testator of his part of the contract in paying the second premium, was agreed to be in Washington.

Liverpool Steam Co. *vs.* Phenix Ins. Co. (129 U. S., 397, 458) is instructive upon this question, it being there held directly that the law of the place of the making of the contract, so far as the nature, obligation and interpretation of the same are concerned, governs the contract, and that a contract or agreement made in one country between citizens or residents thereof, the performance of which begins there, is to be governed by the law of that country, notwithstanding performance is to be completed in some other country and then the law of each country governs as to the contract to be there performed.

And the Supreme Court in the same case, at page 455, quote approvingly the decision of Mr. Justice Bradley, in the case of Morgan *vs.* Railroad Co. (2 Woods, 244), in which it was held that a contract made in New York, by a person residing there, with a railroad corporation having its principal office there, but deriving its powers from the laws of other States, for the conveyance of interests in railroads and steamboat lines, the delivery of property and the building of a railroad in those States, and which, therefore, might be performed partly in New York and must be performed partly in the other States, so far as it concerned the right of one party to have the contract rescinded on account of non-performance by the other party, was governed by the law of New York, and not by either of the diverse laws of the other States in which parts of the contract were to be performed.

B.

The defendant in error erroneously contends further that the statute is made a part of this contract, by necessary implication, if not expressly, because that statute is a limitation on the Company's power to contract, and as much a part of every contract made by plaintiff in error as its charter.

This is not a proper or reasonable construction of the New York statute. Is that statute one intended to regulate everywhere the existence of every New York corporation, to constitute part of its organic law, like its charter, a limitation of its power to contract in any jurisdiction, or was it enacted for the enforcement of a local policy only, applicable to all companies, both domestic and foreign, "doing business," as it says, in the State of New York, that is, collecting premiums therein? Clearly the latter.

It is reasonable to suppose that the intent of the makers of this law was that it should operate equally upon all corporations within the sphere of its influence, and that it was not intended to operate, where, considered with reference to the objects it was originally intended to effect, its operation must necessarily be partial and impose a burden upon its own corporations, from which all others would be exempt. It must be admitted as we have shown above that a Connecticut corporation, though doing business in New York, would not, by reason of this statute, be bound in Washington by such a contract as this.

The act in terms does not apply to corporations chartered by the laws of New York; on the contrary, its terms are purely local; "doing business in the State of New York" is made the test of its applicability. No distinction is made by it between domestic and foreign corporations; it is intended to affect all corporations, domestic and foreign alike, and consequently to operate only where it could affect all alike; that is, in the State of New York.

This New York statute, therefore, not being one to regulate or determine the existence of New York corporations, but being one to apply to all corporations, both domesfic and foreign, and only so far as they did business in New York, it did not enter into and does not govern this contract made by this corporation, outside of that State, and the premiums on which were being collected in the State of Washington.

A statute of Iowa provided that "All insurance com-"panies or associations shall, upon the issue, or renewal "of any policy, attach to such policy or endorse thereon, "a true copy of any application or representation of the "assured which by the terms of such policy are made a "part thereof, etc."

An Iowa company did not so attach the application, *but the Colorado Court did not hold this provision a part of the charter of every Iowa corporation, and did not hold this a limitation upon the power to contract, and as by the laws of Colorado no statements need be attached to the policy, it held the laws of Colorado and not those of Iowa governed.* This holding is in harmony with the contentions of the plaintiff in error.

Des Moines Life Ass'n *vs.* Owen, 50 Pac. Rep., 210 (1897).
U. S. Mtge. Co. *vs.* Sperry, 24 Fed., 838; affirmed 138 U. S., 313.
White *vs.* Howard, 38 Conn., 342 (461)
Ohio Life Ins. Co. *vs.* Ins. Co., 11 Hump. (Tenn.), 24.
American Bible Society *vs.* Marshall, 15 Ohio State, 543.
Bank of Louisville *vs.* Young, 37 Mo., 407.
Vanderpool *vs.* Gorman, 140 N. Y., 563.
Warren *vs.* The Bank, 38 N. E. Rep., 122 (Ill.).
Morawetz on Corporations, Secs. 967-968 (2nd Ed.).

The United States Mortgage Company *vs.* Sperry, above cited, is particularly in point. The Mortgage Company was chartered by the State of New York, with power to loan money upon real estate anywhere within the United States. Its charter prohibits its loaning money at a rate of interest exceeding the legal rate. The legal rate of in-

terest, as established by the law of New York, was seven per cent. per annum. It loaned money in the State of Illinois at ten per cent. per annum, which rate was legal by the laws of that State, but illegal under the laws of the State of New York, and it was therefore contended but not held that the rate of interest contracted for upon the Illinois loan was in violation of its chartered powers.

May it not be said, with equal force, that the general statute of New York, prohibiting life insurance companies, doing business in that State, from forfeiting insurance policies, except upon certain conditions, had for its object to regulate the collection of premiums there upon insurance policies, which would necessarily mainly be upon the lives of persons residing there, and not elsewhere; and that when New York created The Mutual Life Insurance Company of New York, with power to write policies anywhere in the United States, and by general law prohibited any insurance company doing business of collecting premiums in that State from forfeiting policies, except upon certain notice, it did not intend to withhold from said company the power to contract in other States, for insurance upon terms less favorable than those States permitted in respect to insurance there contracted for, by other companies.

The contention of defendant in error that the plaintiff in error, being a New York corporation, its contracts are to be construed as if this statute of the State of New York were incorporated therein, is founded upon the assumption that this statute was intended by the Legislature of New York to be and become a part of the charter or organic law of this and other New York corporations, and that such a statute is, therefore, a limitation upon the powers of the plaintiff in error to make contracts.

Defendant in error is not justified in making this assumption. That is one of the very questions in issue here. The contention of the plaintiff in error as to the true intent and meaning of this statute appears elsewhere in this brief.

In the case of Relfe *vs.* Rundle, the Supreme Court of the United States held that a Missouri statute relating to corporations chartered in that State should be given effect in the State of Louisiana by a Federal Court sitting in the latter State. The Court, however, expressly based this decision upon the fact that the law in question was, in legal effect, a part of the charter of the corporation, and intended by the Legislature to affect all corporations chartered by that State wherever they might do business; and for this reason it gave effect to such law as against a Missouri corporation in the State of Louisiana. The question still remains, however, notwithstanding this and similar cases, whether or not this New York statute became and was, under the rules hereinbefore stated, a part of the charter of all New York corporations, or was intended to be a rule of local policy applicable to all corporations, both domestic and foreign, doing business of collecting premiums in the State of New York.

In the case of Fry *vs.* Insurance Company, above cited, a Connecticut statute was held in the Circuit Court of Missouri to govern in the distribution of the assets of an insolvent Connecticut corporation as between an insurance commissioner suing in a Connecticut Court, and a subsequent attaching creditor in Missouri. Here, also, the decision is based upon the same ground. The Court says: "With respect to this company, it is no doubt true that the act in question forms a part of its charter to the same extent as if it was expressly incorporated therein." And further "it is in terms made applicable to every life insurance company chartered by the State of Connecticut."

The Connecticut law considered and construed in this case, purported in terms to regulate the existence of all companies chartered by that State. The distinction between that case and the case at bar is evident.

In the case of Railroad Co. *vs.* Gebhard, *supra*, the

Supreme Court, upon the ground of international comity, held as binding in New York, and as against minority bondholders there, a Canadian statute determining and regulating the existence of a Canadian corporation, and which became and was in fact, a part of its charter.

In Washington Central Bank *vs.* Hume, *supra*, a policy was issued and delivered in Connecticut, and contained an express provision that it (the policy) was to be in all respects construed and determined in accordance with the laws of that state—a stipulation which is conspicuously absent from the policy now under consideration. The Court says: "Under these circumstances the laws of Connecticut were a part of the contract"; and further, "The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

Here the question was as to performance, to whom to perform, who was entitled to the insurance?

Here also it is plainly seen that the decision of this case proceeded upon the ground that the policy was made in Connecticut, and upon the further ground that the policy contained an express stipulation that it should be governed by the laws of that State.

The Connecticut statute which related to the rights of married women applied to "any policy of life insurance," and the company itself printed the statute on the policy.

The dictum in Hebb *vs.* Ins. Co., *supra*, appears to uphold the contention of defendant in error, but it does not, because it does not appear in the reported case that the contract was not made in the State of Pennsylvania, where the decision was rendered. It appears, indeed, that the property insured was situated in another State, but it does not appear that the contract itself was not made in the State which enacted the law.

In the Phinney case the provision as to waiver shows that the parties did not intend to contract with respect to the laws of New York State. It may be said that this clause is a recognition of the N. Y. Statute. It can be equally said that it implies that the parties did not know what was the conclusion of the law, whether it was part of the charter or not, but wanted to be on the safe side in providing that it should not govern this contract.

POINT IV.

If this Court should hold contrary to the contention of the plaintiff in error as above maintained in Points I, II and III that the New York statute applies to this contract and to collection of premiums in Washington from residents of Washington, then it is submitted that the equitable and true construction of the statute is as follows:

(A) It was not the intention of the Legislature to keep the policy alive, and its provisions unimpaired even after successive defaults in paying the premiums. This would be an inequitable construction of the statute.

(B) *This intention is clearly shown by the amendment of 1897.*

(C) The notice in the statute of 1877 referred to forfeiture of premiums already paid on policies, or the reserve thereon, and to nothing else.

(A.)

It was not the intention of the Legislature to keep the policy alive, and its provisions unimpaired, even after successive defaults to pay the premium.

This would be an inequitable construction of the statute.

No Court has ever held contrary to this construction of the statute.

A statute is to be enforced not according to the letter always. The literal construction of this statute as claimed by the defendant in error produces results which are too unjust to have been contemplated. The meaning of the statute is to be ascertained by the co-relation of the laws relating to the subject matter, and by the evident intent of the law-maker. It is to be enforced only to that extent. In the State of New York this statute has been substantially construed as above claimed in (A) as follows:

In the first case, Carter *vs.* The Brooklyn Life Ins. Co., 110 N. Y., 15, the facts were that the policy in question was subject to an annual payment of $82.80, to be paid on the 25th of October in each year, and it contained the usual clause of forfeiture. The annual premiums were regularly paid from 1870 to 1883; and it will thus appear that there were thirteen years' premiums received by the company, of which, in accordance with the lucid opinion of the Supreme Court in the case of the New York Life Insurance Company *vs.* Statham, heretofore quoted there was a large accretion of these premiums over and above the amount necessary to carry the risk lying in the hands of the company unabsorbed by the cost of carrying the life for that length of time, and which in ordinary insurance parlance is called the "reserve." The notice was not given but before the next installment of premium became due a tender of the amount was made and a reinstatement of the policy demanded. Upon the refusal of the company to reinstate the policy an action in equity was brought to

compel them to do so; and the Court held that they were compelled to do so, and the Court held rightly under this statute. In this case the premiums were compelled to be paid in New York. The collection of the premiums yearly was being had in the State. But that is the extent to which the statute goes. Before another installment becomes due, the unpaid premium should be tendered as well as the coming due premium, at least, upon the date when the latter was due. A reinstatement of the policy after these tenders does not shock the moral sense, or violate our notions of justice or equity. Before the next premium becomes due restitution may be sought to be made, and an application to the equitable powers of the Court to restore the policy may be made.

In the second case Phelan *vs.* Northwestern Mutual Life Ins. Co., 113 N. Y., 147, the Court decided that the statute operated upon foreign companies doing business in New York, and which issued the policies in that State, delivered them there and received payment for them there. It appears from the record that Phelan resided in New York *and the premiums were collectible there.* In that case the premium was due on December 30, 1892, and it was not paid; but it was tendered to the company about two o'clock on January 15, 1893, just fifteen days after it became due, but was refused. The assured died on the night of that day. It was held that the policy was in force.

It is well to bear in mind here the familiar doctrine that "the opinion of the Court must always be read in connection with the facts upon which it is based."

Doyle *vs.* Continental Ins Co., 94 U. S., 538.

Applying this familiar principle to the Phelan case, the decision of the court illustrates the true function of the statute. Here was a case where there was a large accretion of premiums in the hands of the insurance company; here

was a default in the payment of the premium, and within a very reasonable time a discovery of the default, and an attempt to place the policyholder right again with the company, and a tender of the premium with that end in view. Here was an attempt to rectify the mistake which had been made, and it was done within a reasonable time, and payment of the premium due was tendered so as to lay the foundation for the continuation of the contract.

In the third case, Baxter *vs.* The Brooklyn Life Insurance Co., 119 N. Y., 450, the action was brought by an assignee of the policy, who resided in New York and whose premiums were collectible there. The insured died on the 7th of September, 1884, and the premium was due and unpaid on the 24th of August, 1884, a few weeks only. It was held here that the plaintiff could recover, in consequence of the failure to give the notice required by the statute; but the Court was divided upon several questions involved. The Court, however, declared by the Judge writing the majority opinion that the purpose of the statute was to establish a rule which would preserve to the assured the benefits of the premiums paid, and gave him an opportunity to save them from forfeiture by payment within the specified time. It was held there that it was not necessary to tender the amount of the premium due before the action was brought. The Court consisted of seven Judges, and the decision was by a bare majority, three Judges dissenting—Chief Judge Andrews and Judges Earl and Gray.

Says Judge ANDREWS: "The construction placed on "the statute in the prevailing opinion that by its opera- "tion the premium does not become due until after notice "and the expiration of thirty days, and that meantime "an action may be brought and a recovery had on the "policy, although the premium has not been tendered, "is, I think, untenable. * * * It is a condition prece- "dent to the maintenance of such an action that the plaint-

"iff must before suit brought have paid or tendered the "premium unpaid." * * * He is not required to "show that it was paid or tendered on the day fixed in "the policy, because the statute relieves him from that, "but he must aver and prove that the payment was made "at some time before the action was commenced, or else "no right of action has accrued. This construction fully "accomplishes the purpose of the statute, while it re- "lieves it of the anomaly that a contract to pay an insur- "ance on condition of the payment of the premiums may "be enforced, although the condition has never been per- "formed."

There is another case, De Freece *vs.* National Life Ins. Co., 136 N. Y., 150; but there is nothing in that case which varies from the general view of the statute taken by the Court on this point in the cases above cited.

It thus appears that there is a settled construction as to the right to be relieved from a forfeiture by the Courts of the State of New York under this statute, provided that prompt and immediate relief is sought. It is not determined with safety how long a time one may rest after the default is continued before some step should be taken to rehabilitate himself by the policyholder. It will be seen that a powerful minority of the Court objects to the maintenance of an action where the premium has not been paid or tendered before action brought; and there can, therefore, be said to be no settled rule of construction in New York upon this clause of the policy. In such a case it is manifest that the Courts of the United States, before whom the policy may be brought, are themselves to construe the policy in accordance with the principles of law applicable to such construction.

The forfeiture is forbidden by the statute for the non-payment of any premium, unless notice is given. It does not extend its prohibition beyond the singular number, and the non-payment of a second premium unpaid a year

after the first, is not touched upon by the statute. Unless the Court can say from this statute, taken in connection with all the laws relating to life insurance, that it was the intention of the legislature to keep the policy alive and its provisions unimpaired even after successive defaults to pay the premium, the plaintiff below should not have recovered. Will the law bear this construction? Can the judicial mind contemplate such a violent interference with personal rights as being within the contract, unless it is plainly so expressed in the statute.

(B.)

The intention to preserve the contracts only for a year, is clearly shown by the Amendment of 1897.

The Laws of 1897, Chapter 218, which took effect April 8th, 1897, amended the Laws of 1892, Chapter 590, Section 92, and will be found in the appendix hereto.

The claim which we make under this point is that this Act of 1897 is declaratory of the principle stated in "A" above, and also declaratory of general doctrine in Point I, for statute of 1897 says: "post office address in this State," that is, New York, and that the previous premium notice statute of 1877 must be read in the light of the Act of 1897.

The last sentence of the Act of 1897 must be read in connection with the first part of the act.

The main *reason* for the passage of the act was this:

Under the Acts of 1876, 1877 and 1892 insurance companies sent notices irrespective of the question whether they were legally obliged to do so or not, but sometimes they happened to be too informal, or were not sent in time. So that not only were there occasionally *bona fide* cases where New York policyholders, at least, should

have recognition, but there was a class of cases of which the Phinney was one where policyholders had been dunned *ad nauseam* for their premiums, and abandoned their contracts, yet after death, parties had attempted to get insurance for nothing by raising some technical question as to notice, though years had elapsed without the payment of premiums.

The nature of the insurance contract requires *annual* payments (or semi or quarter-annual for convenience merely), and the Act of 1897 was passed in recognition of this principle and of the principle stated in "A," above. The statute of 1897 did away with these attempts to get insurance for nothing, and declared that if the policyholder had the thirty days' previous notice in which to prepare for the payment and pay, the loss was his at the end of that time.

But suppose the company *did not send the notice* in cases where it was obliged to, or sent an informal notice, or one not in time, the policyholder in New York was not to keep on for years, perhaps, refusing or neglecting to pay premiums and yet the policy be kept alive, but he must *before* the next premium becomes due pay up, or litigate the question as to whether there had been a forfeiture or not.

If the second premium day came and the first premium was not paid, where *there had been no legal notice*, then the policy would be forfeited.

The bar to suit is in the last sentence and carries out the early part of the statute. The language is:

> "within one year from the day upon which default
> "was made in paying the premium * * * *for*
> "*which it is claimed that forfeiture ensued.*"

Not that a suit can be brought within one year after a *forfeiture*, for there is no claim.

But the words "forfeited policy" means policy claimed to be forfeited by the company. The policy-holder has *a year* to demonstrate that no *legal* notice was sent, if the company claims it was.

The claim made here has been already sustained in the Oregon State Court in the case of Hathaway vs. *New York Life (unreported). In that case only one premium was paid and the last default was in 1892. The suit was begun April 8, 1899, more than one year after the last default. The Court found as a conclusion of law as follows:* "*That this action was not brought within one* "*year from the date upon which default was made in* "*paying the premium due upon said policy, for the non-* "*payment of which it is claimed that said forfeiture* "*ensued, and is barred for that reason.*"

This Court will be asked to sanction this doctrine in the Cohen and Sears and probably other cases now pending on application for certiorari.

The operation of the bar in the last sentence is concretely shown in the Sears and Cohen cases, in which applications for *certioraris* are now pending in this Court. In both the Sears and Cohen cases suits were not begun within a year from default.

The facts in these cases are briefly as follows:

In the Sears case suit was begun Sept. 25th, 1898. Default existed from May 18th, 1893, to May 18th, 1897, the insured dying March 30th, 1898. The suit was begun Sept. 5th, 1898. The action was commenced, therefore, more than *six years after the first default* and *sixteen months after default* in the premium due May 18th, 1897, which was after the Act of 1897 was passed, and which was the last premium due before the insured's death, March 30th, 1898. The suit was not begun, therefore within a year from the last default.

In the Cohen case suit was begun November, 1898.

Default existed from Dec. 10th, 1892, to June 10th, 1897, the insured dying Sept. 21st, 1897. No suit, therefore, was begun until some *five years after the first default*, and some *seventeen months after the default* in June, 1897, which was after the passage of the Act of 1897, and which was the last premium due before the insured's death, Sept. 21, 1897.

In order to see the operation of this statute, we will discuss its applicability to the Sears case.

Under the Act of 1897, if there is a controversy as to whether a premium is forfeited or not, such an action must be begun to determine such controversy within one year from the date of the default in the payment of the premium. The policy was issued May 18th, 1891, when the first annual premium was paid; the annual premium falling due May 18th, 1892, was paid, but no part of any premium subsequent to that time was ever paid or tendered. The final default was on May 18, 1897, and no suit was begun until September 28th, 1898, some sixteen months afterwards. After the final default Sears, until his death, March 30th, 1898, and his executors thereafter, until May 18th, 1898, might have had the right to litigate the propriety of such default, but not having done so their right to do so was barred. The reason upon which the statute is based clearly is that policy holders must pay their premiums on their due date, or must before a second premium becomes due, litigate any question of forfeiture arising out of the non-payment of the previous premium.

The insured, Stephen P. Sears, died March 30th, 1898; action was commenced September 28th, 1898. It is thus seen that no premium had been paid for five years previous to the death of the insured, or for more than that time previous to the commencement of this action. It will be borne in mind that the express stipulation of the contract is, that non-payment of the premium when due

renders the policy void. If, then, a right of recovery exists, it must be through the statute of New York, and upon the terms prescribed by the statute, and the suit must be brought within the time prescribed by the law which constitutes a part of the statutory right. It is through the grace of the legislature of New York that the right of action upon the forfeited policy is given, if at all, and one who relies upon it must bring himself within the terms of that statute; one of which is the time of taking advantage of the favor it bestows.

Counsel for the defendant in error in this case claims that the Premium Notice Law of New York governed the Phinney contract, and it is claimed that it governed the Sears & Cohen contracts.

Under the doctrine in various New York cases the law of 1876 applied to then existing New York policies, and under the doctrine in the Rosenplanter case the statute is at all times within the control of the legislature, and as the legislature can cast a burden on the company as to existing policies it can from time to time modify that burden or abrogate it entirely.

The statute being general in its terms must apply to a pre-existing default, as well as to one which occurred subsequent. Under the doctrine of

Sohn v. *Waterson*, *17 Wallace*, *596*,

by which it is held that a statute of limitations, general in its terms, begins to run, as to a pre-existing cause of action, from the time when it is first subjected to the operation of the statute. The fact that this statute names the time of default as the time when the limitation of one year begins to run, does not preclude its application to pre-existing causes of action.

This view seems to be emphasized by the insertion made by the amendment of 1897 to the first sentence of

the act, viz.: "No life insurance corporation shall, *within one year after the default in payment of any premium* * * * *declare forfeited any policy*," *etc.*

The contract provides that the non-payment of a premium shall forfeit the policy. The statute qualifies this right of contract by declaring that the default must be brought about by a certain form of notice. Now, this restriction upon the right to contract is itself qualified by the further provision that the benefits of the statute must be invoked within one year from the time when the default was declared. It would seem, therefore, that if one year has elapsed *from the time when the statute went into effect* it would bar any cause of action, whether the insured was then living or not; for if the company unjustly forfeits a policy during the life of the insured he has a cause of action within one year from the attempted forfeiture, and the fact that he dies, and the right of action is then vested in his beneficiary, should not alter the rule.

In other words, we understand that the amendment to the statute is purely one of repose, and intended to compel any person interested in a policy which has been forfeited contrary to its provisions to assert his right by suit within one year.

Under the doctrine in the Rosenplanter case, therefore, the law of 1897 became the law applicable to all existing contracts thereafter made or renewed. Whatever right the statutes give to a notice the law of 1897 couples with it the burden of a bar extinguishing such right within a year after default, and the class of cases which are applicable are Boyd *vs.* Clark, 8 Federal Reporter, 852, which states as follows:

> "The true rule I conceive to be this: that where "a statute gives a right of action unknown to the "common law, and, either in a proviso to the sec-

"tion conferring the right or in a separate section, "limits the time within which an action shall be "brought, such limitation is operative in any other "jurisdiction wherein the plaintiff may sue."

And as was said in the case of Glenn *vs.* Liggett, 135 U. S., 548:

"The rights of the parties in the present case "must be adjudicated according to the require- "ments of the statutes and jurisprudence of Vir- "ginia which State created the corporation, and in "reference to whose laws the contracts of the sub- "scribers to stock were made."

So also in Halsey *vs.* McLean, 12 Allen's Reports, 440, as follows:

"Wherever the common or statute law of one "government enters into and forms a part of a con- "tract which is brought before the tribunals of "another for enforcement, and is not there treated "as immoral or contrary to public policy, the *lex* "*loci contractus* is resorted to, to determine its "validity and construction, however that may differ "from the law prevailing in the forum of the remedy. "The contract of the New York corporation in the "present case must, however, receive the same con- "struction, and the liability of the defendant here "must depend upon the same principles, whether "it was actually made in Massachusetts or in New "York; because, if made here, it was in legal con- "templation made with reference to the New York "acts, and in view of the contingent liabilities "thereby imposed upon officers and stockholders, "which are equally applicable to contracts entered "into within and without the sovereignty which in- "corporated the company (Hutchins *vs.* New "England Coal Mining Co., 4 Allen, 580)."

So also in Eastwood *vs.* Kennedy, 44 Md., 571:

"But where the contract is made in reference to "the *lex loci*, that is, where that law regulates the "contract, defining the rights of the parties there- "under, and prescribing the remedies, it necessarily "enters into its essence, forming a constituent "element thereof, and the contract and the rights "of the parties thereunder must be enforced accord- "ingly."

See also cases cited below.

The amendment by Chapter 218, Laws of 1897, is as follows:

"No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

The Sears policy was issued prior to the amended statute of 1892 but that statute and its amendment of 1897 are applicable, as it was "renewed" after the enactment of 1892. Without the payment of the annual premium the policy lapses, but by means of such payment it is restored, reinstated, continued, or, in the language of the statute, renewed; such is the interpretation given by the courts of New York to this word as employed in the statute.

We quote from *Carter* vs. *Brooklyn Life Ins. Co.* (*110 N. Y., 15*), *17 N. E., 396*:

"We are also of the opinion that the payment of each annual premium constituted a renewal of the policy within the meaning of the term "renewed" as used in the act. While it was provided by the policy that it should continue for the term of the natural life of the insured, it was expressly provided that this was upon the condition that he should pay the annual premiums as they became due by the terms of the policy. A failure to pay such pre-

miums in any year was declared to render the policy null, void and of no effect; but, when paid, it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease or a contract, it is not essential to wait until they have respectively expired; for, after that time, it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its proper sense, is to refresh, revive, or rehabilitate an expiring or declining subject; but is not appropriate to describe the making of a new contract, or the creation of a new existence. Webst. Dict.; Worcest. Dict. It would be at the option of an insurance company to re-execute a forfeited contract of insurance; and, if the act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the act to make it apply to some existing policies, and confer some legal right upon their holders, to avoid a cause of forfeiture; and if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should be any renewed policies thereafter or not. We are therefore of the opinion that the plaintiff's policy was renewed within the meaning of the act" (p. 399).

And such is the view adopted in *Rosenplanter* vs. *Provident Life Insurance Co.*, cited from above.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to *renew* the policy by the payment of the stipulated payment."

The right of action being derived through the statute, the time in which it must be brought becomes a part of the statutory right, and unless suit is instituted within such time the right of action is lost.

In addition to the cases cited above it is to be noted that in distinguishing the rule of limitation with respect to actions given by the common law and those under the statute, in *Finnell* v. *Southern Kan. Ry. Co.*, *33 Fed.*, *427* the court says:

"There is also another class of cases in which a cause of action, which does not exist at common law, is created by the laws of a state. Causes of action of that character only exist in the manner and form and for the length of time prescribed by the statutes of the state which created them, and if suit is brought on such causes of action in a foreign jurisdiction the limitation act of the state which created the cause of action may, of course, be pleaded (p. 428)."

And in *The Harrisburgh*, *119 U. S.*, *199*, this Court expresses the rule as follows:

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have at-

tached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore, to be treated as limitations of the right" (p. 214).

It is impossible to understand the force and effect of the successive acts of 1876, 1877, 1892 and 1897 upon the rights and remedies of policyholders unless these acts are all read together as a part of one system, and it is for this reason that had the application for certioraris now pending in the Cohen, Sears, Hill and Allen cases been granted by this Court, counsel for the plaintiff, in error herein would have asked to have had said cases advanced so that this Court might have had before it all the statutes upon the same subject. This is not absolutely necessary, however, as this Court takes judicial notice of the statutes of the State of New York.

(C.)

The notice in Statute of 1877 referred to forfeiture of premiums already paid on policies or the reserve thereon and to nothing else.

The true construction of statutes often does not appear upon the surface. One has often but little idea of the scope or effect of a statute from a mere *cursory perusal* thereof. In order to reach its real meaning one has to be familiar with all the other statutes upon the same subject, in force at or pre-existing the time of the passage of the statute in question. To construe it properly there should be an appreciation of the exact quality of the evil against which the statute was aimed, its extent and its mischief.

If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all things, the statute must be construed in a spirit of justice. It must not be extended beyond the remedy which is sought to be enforced, and particularly it is not to be extended so as to do injustice, or inconvenience, or absurdity. We are not to suppose that the Legislature, in attempting to remedy a wrong, itself committed a greater wrong, or that in its attempt to remedy a hardship it has committed injustice. All this is familiar learning.

Now, let us look at this statute in the light of these principles. Contracts of insurance are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid, annual or semi-annual or quarterly installments of premium are paid to the company on fixed days. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid on the day they are due, because life insurance takes into account not only the average of human life, but compound interests upon the installments which are paid. To leave out either element would destroy the scientific theory upon which life insurance is based. The contract is not for a fraction of a year or from one installment period to another; although there is that sort of insurance called "term insurance," and this statute expressly excludes that sort of insurance from its provisions. But the insurance for life is the insurance which we are now to deal with; and the policy in this case shows exactly what was to be done by both parties to the agreement. The contract is in two parts. One is a proposition in writing made in Seattle, in the State of Washington, September 22, 1890, and

signed by Guy Carleton Phinney and adddressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as an inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy. The policy provided that the premiums were due and payable at the home office at the city of New York, but would be accepted elsewhere when made in exchange for the company's receipts; which was the case with Phinney and then the following provision was in the policy: "Notice that each and every such payment is to be "made at the date named in the policy, is given and "accepted by the delivery and acceptance of this policy, "and any further notice required by any statute is there- "by expressly waived." *It has a still further provision that "if this policy shall become void by non-payment of premiums all payments previously made shall be forfeited to the company, except as hereafter provided."*

Now, here is the forfeiture which the statute refers to. This is the forfeiture which it is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to continue a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute, that not only is the forfeiture waived, which in this case amounted to one year's premium, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance company

which is unnecessary in order to accomplish the non-forfeiture of the premiums. It is not necessary to go to this length in order to sustain the statute. The statute was intended to provide that notice should be given of the recurrence of the payments, so that the policyholder should not be taken by surprise, or affected by forgetfulness, oversight or sickness, and thus prevented from paying his premium on the very day it was due. It was an extension by the statute of an equitable interposition to prevent the forfeiture. This cannot be construed to bring about a greater forfeiture than it was made to prevent. It cannot be construed, without violating reason and justice, to mean that the policyholder was forever discharged from his obligation to pay the premium because of the failure of this notice. There is something to forfeit. There is an accretion in the hands of the company of the surplus paid on each succeeding year the policy has been in force, which is forfeited unless the premium is paid. And to make sure the payment of which, the clause of forfeiture was inserted in the policy. *It is to prevent that forfeiture that the statute was passed, and in this case one year's premium has been paid. To do equity between the parties, you must deduct from that one year's premium the cost of carrying the insurance for one year as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case.* (See record, p. 336.)

This is rendered clear by the decision of the Supreme Court of the United States in the case of the New York Life Insurance Company *vs.* Statham, 93 U. S., 24. The policy in this case had become by its terms void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the condition

of the country being in a state of war with the Southern States. The Court said it was not proper that the policy should be revived, ro that upon the policyholder's offering the amount of the accrued premiums which had been withheld, together with interest thereon, the policy should be reinstated. Mr. Justice Bradley, on behalf of the Court, exhibits not only his clear knowledge of equitable principles and their application to the ordinary affairs of life, but also his profound knowledge of life insurance. He says: "But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, for out of the co-existence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department

of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, &c. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis*, to meet a premium coming due, demonstrates the common view of this matter."
the Court in that case: "Non-payment at the day involves "forfeiture, if such be the terms of the contracts." Then the Court goes on to show what there is in the hands of the company to be forfeited, surplus premiums over the amount which was necessary to carry the expired risk, and which is called in insurance circles the "reserve." That reserve is equitably the property of the insured; and when he is forced to go out of the company by the unforeseen exigencies of a war he is entitled to take that amount with him.

That is all that could have been forfeited under any circumstances by the contract. Now, the statute comes in and says that the company shall not forfeit that, unless it gives notice. This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die, the whole amount of the insurance shall be paid over after deducting the back premiums. If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Phinney died in this case, then the company would hear of him as it has heard in this case, with a claim for the amount insured, without any attempt whatever to pay the premiums, which are confessedly unpaid and in arrears. No

legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium or to peeserve to the policy holder more than his reserve.

This statute is as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute was exhausted upon the failure to give the notice in September, 1891, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1892. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given."

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premium on the ground of a continuous failure to give notice.

Fisher *vs.* N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the Legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered, for in the quaint language of Judge GROVER, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

POINT V.

If this Court holds that the true construction of the statute required a notice to be sent to Phinney unless waived, then it is claimed by the plaintiff in error (A) that the sending of any statutory notice was waived by Phinney by the express terms of the policy, and (B), that actual knowledge possessed and acted upon by the insured obviated the necessity for statutory notice.

The policy sued upon by defendant in error and set forth in her amended complaint contained the following clause:

> "Payment of Premiums: Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived."

(A.)

THE SENDING OF ANY NOTICE WAS WAIVED BY PHINNEY BY THE EXPRESS TERMS OF THE POLICY.

The argument in support of this contention is, in brief, that the Court of Appeals of New York has never held that this statute could not be waived, nor has any Circuit Court of the United States, except the circuit from which this appeal is taken, and in a case where the Court gave no reason for its holding. Nor has any State Court ever held this statute could not be waived, except that of California. That the statute can be waived is supported by sound reasoning and decisions on analogous statutes.

Upon the trial of this cause plaintiff in error, among other requests to charge, submitted the instructions set forth at large in Paragraph VI, Specification of Errors. This instruction the court refused to give. An exception to such refusal was taken and error duly assigned thereon.

The court should have given the instruction requested. Even if it should be held, notwithstanding the authorities hereinbefore cited, that the statute of New York is applicable thereto so as to require the sending of the notice provided for by such statute, *unless waived*, the right of the insured to insist upon such notice before forfeiture, was effectually waived by the terms of the contract entered into between him and the company.

(1.) *The Court of Appeals of New York has never decided that the notice statute could not be waived by the parties.*

Hence there is no public policy of the State of New York opposed to our contention. This Court is not, therefore, bound by any judicial construction of the Statute but is free to adopt our contention.

(2.) *The learned Judge who tried this case entirely mistook the language of the New York statute.*

In his charge to the jury he said: "Notwithstanding the provisions of the statute of New York, that a provision in the policy itself waiving notice has no effect, etc." (See Rec., p. 353.)

The statute of New York does not contain any such provision.

The law of 1877 does provide that after a premium becomes due, a notice can be sent stating that unless premium is paid within thirty days the policy will be forfeited. The law then goes on to provide that if payment is made within thirty days, "the same shall be taken to be in full "compliance with the requirements of the policy in respect "to the payment of said premium or interest, anything "therein contained to the contrary notwithstanding," that

is, if payment is made within thirty days after notice, it shall be sufficient, no matter what the policy says in respect to payment of premiums, but the legislature does *not* say that notice shall be sent, anything in the policy to the contrary notwithstanding.

The above is the only allusion in the charge of the learned Judge to the question of waiver.

The learned Judge mistook entirely the meaning of the language of the Court in the Baxter case, on page 455 of the report of that case.

(3.) *This notice statute was one which could be waived.*

No Circuit Court of the United States has ever decided that this statute cannot be waived except the Circuit Court of Appeals, from which this appeal is taken. In the case of Equitable Life *vs.* Nixon, 81 Fed. Rep., 796, the same Court, per Ross, C. J. (where the question arose not on a contract of waiver in the policy, as in this case, but upon facts discussed in B below), said: "The statute of "New York presents the condition upon which a policy "may be forfeited for the non-payment of a premium. "The statute is mandatory and controls the contract. Its "provisions are not subject to be set aside or waived by "the company, or the assured, or by both together." Quoting cases discussed hereafter. The above is simply a dogmatic statement of the law. "The statute is mandatory," the Court says, but the statement is supported by no reasoning.

Phinney accepted as the contract by which his rights and those of his representatives were to be determined a policy which, by its unmistakable language, dispensed with the necessity of the insurer giving any notice required by any statute. It was entirely competent for the applicant to make a contract by which the rights, privileges and benefits conferred upon him by this statute were waived.

This statute was passed solely for the benefit and protection of the individual in his private capacity, and could be dispensed with without infringing on any public right or public policy. The public policy of the State would be in no way contravened by its waiver. The person for whose benefit and protection it was enacted could, therefore, by contract waive the benefit and protection of its provisions.

Caffery *vs.* Ins. Co., 27 Fed., 25.
Desmazes *vs.* Ins. Co., 7 Ins. Law J., 926; s. c., 7 Fed. C., 529; case No. 3821.
Ins. Co. *vs.* Curry, 13 Bush, 812.

The Caffery case above cited is worthy of more than passing consideration. The decision was rendered by Mr. Justice Brown, now of this Court. The principles decided are applicable to the case now before the Court, and so far as counsel are able to discover, have never been contravened, except by the single California case of Griffith, the reasoning of which is opposed to the uniform current of authority.

The statute of Massachusetts passed in 1861, provided, that no policy of insurance hereafter issued by any company chartered by the authority of the Commonwealth shall become void or be forfeited by the non-payment of the premium thereon, etc., "*anything in the policy to the contrary notwithstanding.*" (This clause is also in the Missouri statute construed in the Wall case, and in the Iowa Statute construed in Mutual Benefit *vs.* Robison, 54 Fed. Rep., 580.)

The John Hancock Mutual Life Insurance Company, chartered by the Commonwealth of Massachusetts, issued a policy containing *inter alia* this provision: "It is hereby agreed that every person accepting or acquiring any interest in said policy waives the benefit of Chapter 186 of the Laws of 1861 of the Commonwealth of Massachusetts."

Suit having been brought upon this policy, the plaintiff

insisted that the provisions of the statute could not be waived. Judge BROWN, in discussing this contention, at page 28, says: "We think, however, that a party may waive the benefit of the statute. The words 'anything to the contrary notwithstanding' in our opinion were intended to apply to the ordinary form of policies which provides that there shall be a forfeiture if the premium be not promptly paid; but if the parties choose to adopt any other form of policy which shall be non-forfeitable, we think it within their power to agree that this form shall be substituted for the statutory form, and that the statute may thus be waived by the express agreement of the parties."

The Desmazes case has never been overruled. In the case of Holmes *vs.* Charter Oak, 131 Mass., 64, the point as to waiver was not alluded to in any way.

The Desmazes case above cited was based upon the same statute of Massachusetts and Justice CLIFFORD of the Supreme Court, sitting at Circuit, rendered the decision, holding that the statute being made for the benefit of the insured, could be waived by him, not only expressly but impliedly, by assuming a position inconsistent with an intention to claim its benefit, saying: "Contracts in gen-
"eral will not usually have the effect to modify the
"statute but to this rule there is a large class of excep-
"tions.

"Cases often arise where a party is at liberty to waive
"statutory provisions in his favor, and Mr. Sedgwick lays
"it down as a general rule, that where no principle of public
"policy is violated, parties may waive the provisions of a
"statute which, if fulfilled, would operate in their favor,
"and that proposition is fully sustained by many other
"authorities. * * * When the parties undertake in the
"policy itself to declare the meaning and effect to be given
"to its stipulations, they have a right to do so, except in
"cases where there is some provisions in the statute to in-

"dicate an intention on the part of the legislature to con-
"trol the action of the parties in that respect."

In the case of Insurance Co. *vs.* Curry, above cited, the statute provided that all statements in applications for policies should be deemed representations and not warranties, and that misrepresentations should not, where not material or fraudulent, prevent recovery. The Court held that parties could contract contrary to the statute, "No principle of public policy is involved in a case like this, and where a party chooses by his or her contract to stipulate that parts of it shall have a construction and effect different from that the law would give to it but for their contrary declaration in the contract itself, it ought to be interpreted in the Courts as they have contracted it shall be interpreted."

Where the legislature intends that a provision as to notice shall not be waived by the parties, an express enactment to this effect is usual. Thus in Iowa, by Chapter 210 of the Laws of 1880, it is provided that fire insurance companies shall not declare policies forfeited or suspended for non-payment of notes, unless a thirty-day notice is given, "anything in the policy or application to the contrary notwithstanding."

It is a rule of universal application that statutes made for the benefit of a particular individual, or for a particular class of individuals, and which do not concern the public as a whole, may be waived by the individuals for whose benefit they were enacted.

Mr. Endlich, "Endlich's Interpretation of Statutes," Sec. 444, says: "Another maxim which sanctions the statute related to *assessment companies*, the Court said, "Fixed premiums, payable bi-monthly or otherwise, "are incidents of regular life policies. Assessments are "essential incidents of co-operative associations organized "under this statute, *and notice through some medium is*

"*requisite*. The statute relating to assessment companies "does not undertake to fix the time for a notice, but it "does fix and determine what the notice must contain. "The statute contemplates that through these notices the "policyholders shall be advised of the cause and purpose "of the assessments." An entirely different statute is here presented. The premium was wholly undetermined at the time the contract was made. The premium was "for such an amount as the association may deem re- "quisite for the prompt payment of all loans in the depart- "ment in which this policy is issued, and for the proper "maintenance of the contracts in said department, in- "cluding an amount for expenses as hereinafter provided." The fundamental principle of the contract requires that the policyholder should only pay a certain determinable amount but uncertain till he received his notice, and it was contrary to said principle to require him to pay an *arbitrary* amount if he was not notified.

In the Ficklin case (Fidelity Mutual *vs.* Ficklin, 74 Md., 172), the suit was against a Pennsylvania corporation. The language of the Pennsylvania statute of 1885 did not expressly apply either to domestic or foreign companies, or to companies doing business in Pennsylvania, but simply referred to applications in life policies. The Maryland Court held that "These corporations (*i. e.*, Pennsylvania "corporations) manifestly have not the legal capacity to "make a contract which should give a construction to a "warranty in opposition to that which the law has "established" and that the statute affected the very provisions of the contract itself. It was an express limitation on the subject matter of the contract. In the case at bar the notice is a regulation of something *dehors* the contract.

In the subsequent case of Hermany *vs.* Life Association, 151 Pa. St., 23 (1892), the Court said that the above act effected a change in life insurance contracts, and that

"the evident purposes of this legislation was to strike "down in this class of cases, literal warranties so far as "they may be resorted to for the disreputable purposes "of enforcing actually immaterial matters. It provides a "rule of construction for the purpose of preventing in "justice; and it is as much the duty of Courts to enforce "such rules as it is to administer the statute of frauds "and perjuries." The waiver was held contrary to public policy. To this class of statutes belongs that in Ins. Co. *vs.* Pollard, 26 S. E., 421. The same principles do not apply to the statute at bar. To deprive a person of his insurance moneys because of an actually immaterial matter may be disreputable, it may be unjust, but how can it be said to be disreputable or unjust not to give a man special notice of a fixed amount he has already agreed shall be paid at a specified time to entitle him to a renewal of his contract? There is no such element in the premium notice law.

This Pennsylvania statute belongs in this respect to the same class of statutes as the surrender value statutes which obtain in several States as in Missouri, and which provide in substance that after a certain number of premiums have been paid, the policyholder is entitled to temporary or paid-up insurance, provided he surrenders his policy and demands the benefit of the statute within six months. To absolutely forfeit without any remedy whatever might be said to be unjust, and in the Wall case (Wall *vs.* Equitable, 32 F. R., 277), the Court said: "It is "notorious that many insurance companies were rigorous "in insisting upon forfeitures, sometimes under very in- "equitable circumstances, and there was no little public "clamor by reason thereof. Such clamor prompted many "legislatures to interfere and to seek by legislation to "protect what they supposed the rights of the insured." Again the insurance statute says "anything in the policy "to the contrary notwithstanding," and that there is an

implied prohibition against waiver. In the Clement case it was a surrender value statute which was under consideration. All this is foreign to the New York notice statute. New York State has its surrender value statute, which protects against the injustice referred to.

Yet even the New York surrender value statute expressly allows its provisions to be waived, if waiver is in red ink on the policy, putting that statute on the same footing as we claim the premium notice statute is, namely, non observance of such a statutory provision, is governed by the maxim, *cuilibet licet renuntiare juri pro se introducto*. Every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual, in his private capacity, and which may be dispensed with without infringing on any public right or public policy.

A strong instance of the legality of a party dispensing with a statutory requirement is the following:

Where a New York Statute required the "written consent" of a wife to the assignment of a policy, it was held that the "written consent" was not always absolutely necessary. Thus in Dannhauser *vs.* Wallenstein, 28 New York Miscellaneous Reports, 690, it was held as follows:

"The requirement, of Chapter 248 of the Laws of 1879, of the 'written consent' of a husband to a wife's assignment of a policy, insuring his life for her benefit may be satisfied, in the absence of a writing, by proof of his acts in the premises.

"Where he induces her, while she is holding a paid-up policy on his life, representing another policy which he has taken out for his own benefit, to assign the paid-up policy for value in order that he may maintain a business life and support the family, she will not be permitted, twenty years later, and after his death, to challenge the validity of her own assignment upon the ground that he had not given a 'written consent' to it."

Mr. Sedgwick (Sedgwick's Construction of Statutory and Constitutional Law, 2d Ed., p. 86) says: "It often becomes an interesting question, how far a statute can be overreached by private compact or stipulation; how far its requisitions may be waived by private consent, expressed or implied. The general rule is that a contract or agreement can modify a law. * * * So it is well settled that not even the most formal or solemn consent can give jurisdiction to a Court not authorized to take it, and whenever an objection is raised, though it may be a breach of faith and good morals to insist upon it, still it will be fatal. To this rule, however, there is a large class of exceptions. * * * These are cases where a party is held at liberty to waive statutory provisions, which, if insisted on, would inure to his benefit, and generally it is true that where no principle of public policy is violated parties are at liberty to forego the protection of the law. * * * It has been said in New York, 'a party may always waive a right in his favor created by statute the same as any other.' * * * The general rule holds good as well in regard to constitutions as to statutes. A party may waive a constitutional as well as a statutory provision made for his benefit. * * *"

Mr. Cooley (Cooley's Constitutional Limitations, 6th Ed., p. 214) says: "Where a constitutional provision is designed for the protection solely of the property rights of a citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will."

The same rule obtains in England. The charter of the Northeastern Railway Company enacted: "Every passenger traveling upon the said railways may take with him his ordinary luggage, not exceeding one hundred and fifty pounds in weight, for first class passengers, and one hundred pounds in weight for second and third class passen-

gers, without any extra charge being made for the carriage thereof." A passenger upon such railway purchased an excursion ticket at reduced rate, on the condition (advertised by placards and handbills) that persons availing themselves of these tickets should carry with them no luggage, and it was held that by purchasing a ticket at this reduced rate the passenger waived the privilege conferred upon him by statute of taking with him his ordinary luggage without extra charge.

Ramsey *vs.* Northeastern R'y Co., 14 C. B. N. S., 640.

In Phyfe *vs.* Eimer, 45 N. Y., 102, Judge RAPALLO, delivering the opinion of the Court, says: "One of full age and acting *sui juris* can waive a statutory, or even a constitutional provision in his own favor, affecting simply his property or alienable rights, and not involving considerations of public policy."

See also Buel *vs.* Trustees, 3 N. Y., 197.

So it has been held that the debtor may waive a statute of limitations made for his benefit.

Weber *vs.* Williams College, 23 Pickering, 302.
Buswell on Lim. and Ad. Poss., Sec. 49.

Also, parties may waive the right declared by statute of assignees of life, fire, &c., insurance policies to sue in their own name.

Insurance Co. *vs.* Lupold, 101 Penn. St., 111.

An adjacent land owner may waive his rights under an act requiring a railroad company to fence.

Ry. Co. *vs.* Decker, 2 Watts, 343.

If the policy was controlled by the terms of the New York statute, can it be doubted that the benefits and privileges conferred by this statute upon the insured were waived by the express terms of the contract?

The general public could have had no concern in a private contract between Mr. Phinney and the plaintiff in error. However favorable or unfavorable the terms of that contract might have been, the public welfare was in no way affected thereby. The parties were *sui juris*. They alone were interested in the kind of a contract to be made. Mr. Phinney had a right to claim the benefit of the protecting provisions of the New York statute, if it be applicable; and he had an equal right to contract for the waiver of the benefit thereof. He did waive them in clear and express terms, showing his intention so to do, and the learned Court below committed reversible error in refusing to so construe the contract as to give effect to the plainly expressed intention of the contracting parties.

The question of waiver of the provisions of this statute have never been adjudged by any decisions except in the Nixon case, above referred to, and the case of Griffith *vs.* New York Life Ins. Co. (101 Cal., 627), cited in the Nixon case, wherein the decision was adverse to the contention of plaintiff in error. This Court, however, is unhampered by any binding adjudication, and we submit for its consideration that the Griffith case is outweighed by the authorities heretofore cited, both in the reasoning by which the conclusions are reached and in the authority of the Courts rendering the same. The same may be said of the case of Warner *vs.* National Life, 100 Mich., 157, construing a different statute. This Court can hardly err in adopting as its own the conclusions reached by such jurists as Justices Brown and Clifford.

Both the Caffery and Desmazes cases are cited by the California Court with apparent approval, but that Court attempts to distinguish between the language of the New York and Massachusetts statutes. It is difficult to conceive any distinction in meaning between the language used in the New York statute, "No life insurance com-

pany * * * shall have power to declare forfeited or lapsed any policy," etc., and that used by the Massachusetts statute, "No policy of life insurance * * * shall be forfeited or become void," etc. (Revised Statutes, Mass., 1892, p. 717, sec. 159). It is, to say the least, hypercritical to draw a distinction between a statute which declares that a company shall not do a certain thing, and one that declares it shall not have power to do that thing. Can it be doubted that both Legislatures had in view the same purpose? It is also noticeable that both statutes use the expression, "anything in the policy to the contrary notwithstanding," which, under the authority of the cases relied upon by plaintiff in error, means nothing more than this, that a forfeiture shall not be had, even though contracted for by the express terms of the policy, and does not in any way refer to mere question of notice and does not inhibit the parties from contracting to waive the statute as to notice.

It will be noted that the facts upon which the Supreme Court decided the case of Ins. Co. *vs.* Clements, *supra* (cited in the Nixon case), that the provisions of the statute of Missouri could not be waived, are entirely lacking from this case. In that case the Circuit Court of the United States sitting in the Western District of Missouri, held that by reason of the public policy of the State of iMssouri, a waiver of the statute of that State relating to the forfeiture of life insurance policies, could not be made, even by the express agreement of the parties. This case was one in which the Federal jurisdiction depended upon the diverse citizenship of the parties. The Federal Court in such a case adjudicates the rights of the parties, precisely as should a tribunal of the State in which it is sitting.

Pritchard *vs.* Norton, 106 U. S., 124 (129).

The public policy of the State of Missouri was, there-

fore, binding upon the Federal Court, which decided the Clements case. No public policy against waiver has ever been declared by the highest Court of New York.

A strict limit is drawn by the Constitution of the State of New York over the power of the Legislature to interfere with the right which a man has to make any contract he chooses which is not forbidden by law. The liberty which is guaranteed by the Constitution is not merely freedom from physical restraint, it is freedom from interference with his right to pursue any honest calling and to make any honest contract. *In re* Jacobs, 98 N. Y., 107; People *ex.* Marx, 99 N. Y., 377. In the absence, then, of fraud, duress or imposition, every man in the State of New York, and we assume also in the State of Washington, is free to agree to waive rights which he enjoys by statute—yes, or even rights which he enjoys under the Constitution. It is his privilege to grant away that right which the Legislature has given him and which the Constitution guarantees him. He may, for instance, waive the right of trial by jury. If it be true that he can waive such a grave constitutional right as that, which is the expression of the ultimate policy of the law, not only of the State, but of the nation, can it be said that he has not the right to waive the service of a notice of the time and place of the payment of an indebtedness? An endorser on a bill of exchange may waive the legal incidents of protest and notice of non-payment, and yet leave all the other incidents of the bill unaffected and its obligation of payment undisturbed; and he may make this stipulation on the bill itself when he endorses it. So the maker of a promissory note may, in the very contract itself, waive demand for payment. There is nothing better established in the law than that the endorser of a bill or note is liable to pay it if it is not paid by the party primarily liable; and yet the liability may be waived by the acceptance of

such an instrument with the words, "without recourse" written over the endorsement. So the benefit of exemption and stay laws may be waived.

Daniel on Negotiable Instruments, Sec. 61.

This rule of the right to contract is universal, excepting only where it is the policy of the law that certain liabilities to the public at large by one who is engaged in a public business shall not be waived by contaret. Thus a common carrier or an innkeeper shall not contract against the liability for his own negligence; and yet even this doctrine is yielding to modern influence.

Sir George Jessel says in Printing Co. *vs.* Sampson, 19 Eq. Cas. L. R., 462. "There is one thing," said that eminent Master of the Rolls, "which more than any other public policy requires, and that is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held good and shall be enforced by courts of justice."

If the parties had the power to contract that the laws of New York should govern this contract, they certainly had the power to declare at the same time how far said contract should be subject to said laws, and to waive any particular law of New York, or any portion of any statute of that State.

(4.) *None of the decided cases holding that this statute cannot be expressly waived are either well considered or binding upon this Court.*

In the Nixon case, 81 F. R., 802, *there was no contract of waiver in the policy.* The waiver relied on was one after the premium became due. The Court said "that "the statute of New York prescribed the condition upon "which a policy may be forfeited for the non-payment of "a premium. The statute is mandatory and controls the

"contract. Its provisions are not subject to be set aside "or waived either by the company, or the assured, or "by both together," and refers to the *Clements* case, the *Hicks* case, the *Griffith* case, and the *Warner* case. This statement of the law is simply dogmatic. No reason of any kind is assigned. The statute is simply declared mandatory. The *Trimble* case (83 F. R., 85) in the same circuit simply followed the Nixon case.

The Clements case was not upon this statute.

The Rosenplaenter case (96 F. R. 721), had no question in it of waiver of any statute or stipulation to waive a statute.

In the Hicks case (60 F. R., 690) also there was *no agreement of waiver in the* policy, and no claim that *sending of notice* had been waived. The claim by the plaintiff was that there had been such a course of dealing that the assured was authorized to suppose that payment of the premiums within a reasonable time after the day of payment would be satisfactory to the defendant. The case is no authority that the statute cannot be expressly waived.

In the Griffith case (101 Cal., 627) there was an express agreement to waive. The Court held that the notice was a matter of public policy, because of the phrase in the statute "No * company * * shall have power." The statute does not say that the notice shall not be waived. Suppose the statute had read "No * * company * * shall have power, etc., * * unless sending notice expressly waived." There would have been nothing inconsistent in this. The Court obviously lays an undue stress on the word "power," which has no special significance, and as has been shown elsewhere, has been eliminated from later statutes. The Court adds: "The reasons for such a policy are so numerous and ob- "vious, that it is not deemed necessary to occupy time

"and space in specifying them." No Court has ever stated any "numerous and obvious reasons," for there are none. The propriety of a waiver is abundantly shown elsewhere in this point.

In the case of Ins. Co. *vs.* Smith, 41 S. W., 680, there was no *discussion* of the question of waiver.

The Warner case, 100 Michigan, 157, was not a case construing the New York Statute in question, but another statute in the State of New York relating to Assessment Companies. The policy provided that notice should be sent that the premium was payable and that any other notice was expressly waived. It further provides that in the event of the holder not receiving a notice he should pay an amount equal to the last premium paid.

The statute requires that each notice shall truly state *the cause and purpose of the assessment.* The Court held that these statutory provisions could not be waived by the parties and that the statute contemplates that through the notice the policyholder should be advised *of the cause and purpose of the assessment.* The statute could not be voided by a condition annexed to the policy, but in case no notice was given the insured should forward to the association an amount equal to the previous assessment, spoken of in the statute as "the scope," but this statute is entirely different from the one at bar.

The following cases are cited to show the great variety of instances in which the doctrine of waiver is applied in both State and Federal Courts, all bearing directly upon the present case.

Wright *vs.* United States (1883), 108 U. S., 281.

Section 3264 of the Revised Statutes provides for a survey of the distillery by the collector, and a written report thereof in triplicate, "of which one copy shall be deliv-

ered to the distiller, one copy shall be retained by the collector, and one copy shall be transmitted to the commissioner of internal revenue, and the survey shall take effect upon the delivery of such copy to the distiller."

Said the Court (WAITE, C. J.): In holding that the distillers had waived notice by endorsing on the report of the survey and signing "We hereby accept the within survey and consider the same as binding upon us on and after this date" with date attached, "the Court below decided that this endorsement was in law a waiver of a delivery of a copy of the report to the distillers, and that the tax was consequently collectible. To this we agree. The language of the act is that 'the survey shall take effect upon the delivery of said copy to the distiller.' This is equivalent to saying that the survey shall be binding on the distiller when the copy is delivered to him. When, therefore, the distiller, in this case, accepted the survey and stipulated that it was binding on him, he, in effect, said that he would consider the survey as having effect without the formal delivery of a copy. *This he might do.*

Schutte *vs.* Thompson (1872), 15 Wall., 151.

"Although the formalities prescribed by the thirtieth section of the Act of Congress of September 2d, 1879, authorizing the taking of depositions *de bene esse* in certain cases and stating the circumstances under which and the words in which they may be taken, must be strictly observed (the act itself being in derogation of the common law), yet a party may waive any provisions intended for his benefit." Said the Court: "A party may waive any provision, *either of a contract or of a statute intended for his benefit*."

Ins Co. *vs.* Norton (1877), 96 U. S., at page 240.

Mr. Justice Bradley in the following case says:

"*A party always has the option to waive a condition or stipulation made in his own favor.* Rule applied in holding that an insurance com-

pany had, by accepting premiums after they fell due, waived its right to insist upon a forfeiture for non-payment of premiums which were tendered when insured was *in extremis*."

Henderson's Distilled Spirits (1871), 14 Wall., 44.

Mr. Justice Clifford in the following case says: "Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury and submitted the case to the Court upon an agreed statement of facts *as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation.*"

Woods *vs.* The Board of Supervisors of Madison County, 136 N. Y., 493 (1893).

"The defendant has capacity to sue and be sued, to audit, settle, pay or compromise claims against it, and this fairly implies power to agree upon terms of payment *and to waive by proper agreement the defence of the Statute of Limitations as to claims not barred.*"

State *vs.* Benton, 48 New Hampshire, 551 (1869).

In holding that the only surety in a criminal recognizance was bound, although the statute required two sureties, the Court said:

"The law requiring two sureties was not enacted for the benefit of the respondents or sureties, but for the security of the state. * * * Individuals in many instances, are allowed to waive statute requirements enacted for their own benefit and it seems reasonable in a case like the present that the state should have the same privilege."

Tasker *vs.* The Kenton Ins. Co., 58 N. H., 469 (1878).

In a California case the policy contained following clause:

"It is furthermore hereby expressly provided and mutually agreed, that no suit or action against the company for the recovery of any claim by virtue of this policy, shall be sustainable in any Court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur.

The action was not commenced within the twelve months succeeding the loss. The clause, said the Court, "is in form and effect a condition precedent and unless it is complied with, there can be no recovery at common law. It is said that the action may be maintained under the provisions of Gen. St. C. 157, S. S., 6, 7. * * * But the parties to the policy did not intend that the statute should govern or control it, as they have expressly agreed that the clause in the policy shall be operative, any statute of limitation to the contrary notwithstanding. *Statutes that are made for the benefit of particular persons may be waived by them.* Sections 6 and 7 were evidently enacted for the benefit of those insured, but the plaintiff has waived their benefits in terms as absolute as language can express."

Ellis *vs.* Mass. L. Ins. Co. (Cal.), 45 Pac., 988 (1896).

A life policy provided that no claim should exist under it unless notice and proof of death were given within two years from death of insured. A statute fixed a shorter period, namely, ninety days within which such notice should be given. In holding that the policy provision was a waiver of the statutory benefit, the Court said:

"This requirement in reference to the time of notice and proof of death is imperative and binding upon the insured and his beneficiaries. But this is a provision incorporated in the law for the benefit of the insurer. A provision in a law or in a contract intended for the benefit of a party may be waived by the party to be benefitted thereby."

See also:

Warren *vs.* Walker (23 Maine, 453), holding defendant *estopped* from setting up statute of limitations by reason of waiver, although memo. containing waiver, was not sufficient as an express promise and in writing to take the case out of the statue.

Lyman *vs.* Littleton, 50 N. H., 42, holding that a town may waive notice of a pauper claim required by statute on the ground that the statute "may be waived by the party for whose benefit the statute provides."

Hanover *vs.* Weare (2 N. H., 131), holding that, in an action for a claim against the town, a statute could be effectually waived which provides that "no such action

shall be sustained against any town or person for any sums expended as aforesaid, unless such notice has been given in the manner aforesaid," on the ground that a statute can be waived and a party will be estopped from setting up a statute which waived one intended for his benefit.

Sleeper *vs.* Ins. Co. (56 N. H., 401), overruling Chamberlain *vs.* Ins. Co. (55 N. H., 249), which, notwithstanding, was cited as an authority, *a controlling authority*, in cases relied upon by defendant in error, notably White *vs.* Con. Mutual L. Ins. Co., 4 Dill., 177, and holding that a statute does not control an express stipulation in a fire policy.

Beers *vs.* State of Arkansas, 20 How., 529, holding that a State may waive its privilege by authorizing by its constitution suits to be instituted against its own Courts.

Bomberger *vs.* Terry, 103 U. S., 40, holding that a jury may be waived by implication.

Howard *vs.* Stilwell (139 U. S., 199), holding that party may waive right to object to interrogatories.

In the matter of N. Y. L. & W. Ry. Co., 98 N. Y., 447, in holding that a contract appointing a commissioner to determine the value of property appropriated by the company, and regulating the proceedings, was binding upon the party, said EARL, J., of the New York Court of Appeals :

> "Parties by their stipulations may in many ways make the law for any legal proceedings to which they are parties, which not only binds them, but which the Courts are bound to enforce. They may stipulate away statutory and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of the Court shall be final, and thus waive the right to appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced ; and generally, all stipulations made by parties for the government of their conduct or the control of their rights in the trial of a cause, or the conduct of a litigation, are enforced by the Courts."

In the case before us there was an express waiver of the rights to this notice. The act was passed, as the Court of Appeals declares, from the purpose of preserving to the assured the benefit of the premiums which he had paid and saving them from forfeiture. The object of the act, therefore, was for the benefit of the assured ; and there is no statute of New York or Washington which prevents him from entering into a contract that he dispenses with that notice. He has done so in this case by accepting the policy containing that provision.

As heretofore stated, it is contended by defendant in error that the statute of New York, above quoted, applies to and governs this policy by reason of the express agreement of the parties to that effect. To sustain this contention reliance is placed upon that clause in the application which states: "This application is made to The Mutual Life Insurance Company of New York subject to the charter of the company and the laws of the State of New York."

This contention of defendant in error furnishes additional ground for holding that the position taken herein as to the waiver of the provisions of this paragraph, is correct. If this contract is governed by the statute of New York, because the parties have stipulated that it shall be so governed, and by the same contract the parties have limited the application of said statute, and have agreed that no notice of non-payment shall be necessary, then, surely, if effect is given to their contract for the purpose of subjecting this policy to the control of the New York statute at all, effect must also be given.

B.

ACTUAL KNOWLEDGE POSSESSED AND ACTED UPON BY THE INSURED OBVIATED THE NECESSITY FOR STATUTORY NOTICE.

It was established as a fact by the undisputed evidence in this case that prior to the maturity of the premium for 1891, the company sent a notice to the assured stating when the same would be due and payable, that this notice was received by him, and that in response thereto he came to the representative of the company and endeavored to make terms for the payment of the premium other than those contained in the policy, by offering to give time notes for the payment of the amount of the premium. The plaintiff in error never agreed for the purposes of the case that no notice was sent. The matter appearing on page 190 of the Record applied only to the witnesses in question and not to Stevenson's testimony. The statement there made only referred to notice in *statutory form*. No evidence of such matter appearing on page 190 of the Record was given on the trial as appears by all the evidence set forth. Evidence as to other notice and knowledge was received without objection and cross examined upon. Evidence being before the jury without objection plaintiff in error was entitled to proper instructions upon it. Defendant in error's contention as to this is an after thought on appeal. The plaintiff in error duly requested the Court to give the instructions set out in paragraphs XV and XVI, Specification of Errors, which instruction the Court refused to give, to which refusal exception was duly taken and error assigned thereon.

We submit that any notice given, recognized and acted upon by the assured as notice, constitutes a substantial and effective compliance with the statute, and although

the notice given may not have been in the form required, nor at the time prescribed by the statute of New York, yet, if Mr. Phinney did not object to its sufficiency as notice at the time, but on the contrary accepted the same as a proper notice, neither he nor his representative can now be heard to say that said notice was insufficient as a compliance with said statute.

Johnson *vs.* Oppenheim, 55 N. Y., 280, 291.
Bryant *vs.* Goodnow, 5 Pickering (Mass.), 228.

Referring to a statute which provided that in warranties contained in applications for policies, no misrepresentation or untrue statement, made in good faith by the applicant should affect a forfeiture or be a ground of defense "unless such misrepresentation or untrue statement relate to some matter material to the risk," said Judge STERRETT, "The evident purpose of the legislature was to strike down, in this class of cases, literal warranties, so far as they may be resorted to for the disreputable purpose of enforcing actual immaterial matters. It provides a rule of construction for the purpose of preventing injustice; and it is as much the duty of Courts to enforce such rules as it is to administer the statute of frauds and perjuries. It would be contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver, such as was insisted on in this case. The Court was therefore right in holding that the waiver was invalid."

Hermany *vs.* Life Assn., 150 Pa. St., p. 24.
Farlow *vs.* Ellis, 15 Gray (Mass.) 231.
Weymouth *vs.* Gorham, 22 Maine, 385.
York *vs.* Penobscott, 2 Greenleaf (Me.) 1.

In Johnson *vs.* Oppenheim, this principle is thus stated: "When some formal act or acts are to be performed by a

" party as a condition precedent to some right, or to per-
" fect a right of action or property, and the act as per-
" formed is defective or imperfect, and the adverse party
" whose right it is to object and insist upon a more perfect
" compliance with the condition, makes no objection to the
" manner of its performance, but accepting the perform-
" ance as perfect, places his objection to the claim and right
" asserted upon another distinct and independent ground,
" he is held to have waived all objection to the formal or
" technical defects. The rule rests upon the ground that
" the party by his silence has misled his adversary, and
" not having spoken when he ought, shall not be permitted
" to speak when he would. The principle has its most fre-
" quent application in actions upon policies of insurance,
" where there have been some defects in the preliminary
" proof of loss of interest, which have not been objected
" to, but the claim has been resisted on other grounds."

The parties to a policy of insurance by law stand upon the same footing, and the same principles of law apply to the insured as to the insurer; and if the insurer may waive rights by receiving, accepting and acting upon notices, proofs of loss, etc., defective in form and insufficient in point of time, can the insured likewise bind himself and his representative by the same conduct with reference to notice required, either by the law or his contract? Certainly, it is not the law that the rights of the different parties to the same contract are to be measured by dissimilar rules and standards. The same rule should work both ways.

The case of Bryant *vs.* Goodnow seems specially applicable to the case at bar. It was an action upon a subscription to establish a stage line. The subscription provided that when the shares had been taken up there should be a meeting of the subscribers for the purpose of making ar-

rangements to carry on the proposed business. The defendant resisted payment of his subscription on the ground that he had not been notified of the first meeting of the subscribers; but it seems that he, subsequent to this meeting, offered to pay his subscription if the plaintiff would *receive oats in payment.* By parity of reasoning it would seem that Mr. Phinney waived any objection to the form of notice when he offered to pay his premium, provided the company would *receive notes in payment.*

Says Chief Justice Shaw, Farlow *vs.* Ellis:

> " Waiver is a voluntary relinquishment or renunciation of some right, " a foregoing or giving up of some benefit or advantage, which, but for " such waiver he would have enjoyed. It may be proved by express " declaration, or by acts and declarations manifesting an intent and " purpose not to claim the supposed advantage; or by a course of acts " and conduct, or by so neglecting and failing to act as to induce a be- " lief that it was his intention and purpose to waive * * * " The question of waiver, therefore, is a question of fact for a jury; " it may be proved by various species of proofs and evidence, by dec- " larations, by acts, and by nonfeasance or forbearing to claim or act: " but, however proved, the question is: has he willingly given up and " forborne to claim the benefit of the conditions?"

It is specially significant that the Maine cases above cited are both cases wherein a *notice required by statute* to be in a particular form was informal; and the party receiving the same having made no objection to the form of the notice at the time of its receipt, and having acted thereon, it was held that the statute was substantially complied with, and that the notice was sufficient.

(a.) *Specifications of Errors XV and XVI are based on instructions in accordance with the evidence.*

(1.) Phinney, before the maturity of the premium, came to the representative of the company and requested further time in which to pay the premiums.

The testimony is (Rec., pp. 260, 265, 266) that Phinney asked to give notes payable in sixty days.

(2.) Such extension of time was refused.

The testimony is (Rec., p. 260, 265, 266) that the agent declined this proposition.

(3.) Phinney, however, recognized the fact to be that his policy would be forfeited unless the premium was paid.

Phinney was sent a notice (Rec., p. 259). He responded to that notice to pay his premium on or before the due date (Rec., p. 260).

The policy itself provided, "This policy shall become void by non-payment of premiums" (Rec., p. 4).

(4.) Phinney thereupon stated that he was unable to pay said premium.

Phinney offered notes payable in sixty and ninety days (Rec., p. 260).

This was not paying the premium, and he offered nothing else.

(b.) *The plaintiff in error however contended that actual knowledge by the insured of the due date of the premiums and actual dealings respecting the payment of the premium is equivalent to serving the statutory notice if required at all in this case.*

The defendant in error cites some cases in New York to show that the statutory form of notice must be followed. None of the cases touch the facts in this case, or what is the effect of receipt of actual notice and an actual response thereto, such as was made in this case.

The Court in the Phelan case expressly held simply that the irregular notice *was never received.*

In the Carter case the *notice was sent to another person.*

POINT VI.

The defendant in error is estopped from asserting any claim under the policy in suit, for the reason that her testator had abandoned and surrendered the Policy as an existing contract long before his death.

Three propositions are here presented:

(1.) That the testator had a right to abandon and surrender the policy.

(2.) That he exercised that right.

(3.) That his executrix is estopped to invoke the provisions of the statute of New York respecting notice.

(1.)

THE TESTATOR HAD A RIGHT TO ABANDON AND SURRENDER THE POLICY.

This proposition requires no argument to support it. "The very nature of this class of contracts," says Mr. Joyce, referring to life policies depending upon the payment of premiums at specified times, "implies a right of the assured to annul the same" (Joyce on Insurance, Vol. II, p. 1636; and see authorities cited in the discussion of the third proposition, *infra*).

This might not apply to cases where one has

insured his life for another's benefit, for, as was said in Griffith *vs.* Life Ins. Co. (101 Cal., at page 638) "the doctrine is well settled that where a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance upon his own life, *payable to another*, the insured cannot surrender the policy without the consent of the beneficiary." But if the beneficiary is the insured himself, as in the present case, his right to surrender does not depend on the consent of anyone else. Whoever is the beneficiary, whether the insured or some third person, to him belongs the policy the moment it is issued, and if insured and beneficiary are combined in the same person that such person has absolute control, is an elementary proposition.

(2.)

THE ASSURED EXERCISED HIS RIGHT TO ABANDON AND RESCIND THE CONTRACT.

This is established by the positive testimony of F. L. Stinson, the company's agent, which remains uncontradicted, and not only so, but is corroborated by facts and circumstances which are not in dispute and which can be explained upon no other theory than that the company was in possession, as of right, of the policy in dispute.

From the testimony of Mr. Stinson, who was at the time the general agent of the company for the State of Washington, it appears (Printed Record, pp. 254–301) that, prior to the 24th day of September, 1891, the day when the second year's premium fell due, the assured, having received notice that it was about to become due, called upon the agent at Seattle and endeavored to induce him to accept notes in payment of the premium instead of cash as required by the policy. This, the agent, as in duty bound, refused to do, and the assured, being unable to pay the

premium, suffered default. In December or January following "I was in Mr. Phinney's office," says the witness (p. 262), "and we got talking about insurance and the subject of his policy came up, and I requested him to let me have the policy to use for canvassing purposes and he stated the same having lapsed he had no further use for it and I could take it if I wanted it." The agent thereupon took the policy and retained it. Here was a recognition on the part of the agent that the policy was no longer in force as indicated in his request to take it away with him which he would not have preferred had he regarded the policy as a valuable instrument, evidence of a subsisting contract; and a similar recognition on the part of the testator in express language. These facts, as has been said, are not contradicted.

Moreover, it appears that during the period of nearly two years from the time of his delivering the policy to the agent until his death in September, 1893 (p. 9), no effort or attempt was made on the part of Mr. Phinney to regain possession of the policy. At the time of his death it was not amongst his papers or other policies; his executrix could not produce it at the trial; it had never been in her possession (p. 235); she does not include it as an asset belonging to her husband's estate in her sworn statement on applying for letters testamentary, placing the value of the total personal assets at $50,000, instead of $150,000, as they would have amounted to had the policy been included, and regarded as still subsisting, it would have been included, *for it purports to be payable to the assured's estate* (Plffs. Ex. "A." pp. 212-215 Printed Record); in fact, she never knew of the existence of any such policy until ten months after the death of her husband, as she admits in a letter to the company. "I was not aware," she writes, "that he held such a policy until a few days ago, when the matter was brought to my atten-

tion" (Pltffs. Ex. "C," pp. 227 228 P. R.). From the time of the surrender in December, 1891, until July, 1894, no overture or communication whatever was made by Mr. Phinney, or by any one on his behalf, to the company or its agent for a return of the policy or by his executrix or other person on her behalf, to have the policy paid or recognized as a valid subsisting contract; not to Mr. Stinson up to the time when he was succeeded by Mr. Pond as the company's general agent (p. 263), nor to Mr. Pond until July, 1894, or ten months after the testator's death (p. 9), not although the other assets, including life insurance, had been collected long before.

These are the facts upon which plaintiff in error claims that by agreement between the parties—between the insured on the one hand, in the exercise of his right to surrender, and the company on the other, in the exercise of its right to accept—the policy was rescinded and abandoned *so far as the actual intention of the parties could be carried out.*

"The most solemn contract under seal, when the statute of frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied, and a contract within the statute may be taken out of it by the conduct of the parties."

Railroad Co. *vs.* Trimble, 10 Wall., 267, 363.

"After the agreement had been reduced to writing it is competent to the parties, in cases falling within the general rules of the common law, at any time before the breach of it by a new contract, *not in writing*, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to or subtract from, or vary or qualify the terms of it, and thus make a new contract" (Language of Lord Denman, quoted in Emerson *vs.* Slater, 22 How. Rep., 28-41).

We have just said that the policy was rescinded and abandoned so far as the actual intention of the parties could be carried out. But, on the part of the defendant in error, it is contended, that the intention of the parties could not be carried out by reason of the statute requiring notice. Usually where a notice is required by statute actual knowledge will dispense with it, and notice can be waived. Hanover *vs.* Ware, 2 N. H., 131; Embden *vs.* Augusta, 12 Mass., 307; Lyman *vs.* Littleton, 50 N. H., 42; *in re* Cooper, 93 N. Y., 507; Sharpley *vs.* Abbott, 42 N. Y., 443; Lee *vs.* Tillotson, 24 Wend., 337; Embry *vs.* Conn., 3 N. Y., 511; *in re* D., L. & W. R. R., 99 N. Y., 477.

To an ordinary mind, to serve notice upon a person who is already present for the purpose of engaging in the transaction as to which notice is required to be given, is a useless, purposeless, vain proceeding. Nevertheless, it is contended by counsel for the defendant in error, that the statute requires it.

Suppose it be conceded for argument's sake that if the assured has not been served with the statutory notice he will not suffer a forfeiture, notwithstanding that he has actual knowledge of the premium's maturity—this has no application to a case where *he has entered into a new and binding obligation inconsistent with the continuance of the original contract of insurance, and which would warrant and entitle the insurer to treat the contract as at an end and withhold notice.* This is exactly what was done.

The right of the assured to abandon the contract, no statute could deprive him of. The statute did not restrain him from contracting with the company with reference to the policy for all time and in respect of all matters. Notice! There was no question of notice discussed or considered leading to the surrender, there was no question

of waiver of notice. The parties met before the time for payment had expired and by mutual agreement evidenced by the positive testimony of Stimson and by the subsequent events set forth above, the contract was abandoned and surrendered. Suppose the agent, with authority from the plaintiff in error, had complied with the assured's request by accepting notes instead of cash, upon the stipulation that if the notes were not paid at maturity the policy would lapse. In such a case, if the notes were not paid at maturity, would the assured still have the right to insist that the statute had not been conformed to? Certainly not upon any principles of common sense or justice. And yet the taking of the notes would not affect the position of the plaintiff in error, resting, as it does, upon the express agreement, which in the supposed case provided for an extension and in the actual case for a present abandonment and surrender.

This question of agreement, abandonment and surrender was not submitted to the jury in proper form according to the evidence.

The portion of the charge in which reference was made to the agreement contained an intimation that the jury might consider whether it was induced by false representtions or deceit. We quote the charge as contained in the 20th exception.

> "If the evidence in this case shows that Mr. Phinney did voluntarily, *without being induced by false representations or deceit*, rescind the contract and give up the policy, rather than to continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy, so that it would no longer be a continuing contract."

Now, there is not a word of evidence that any fraud was practised by the company or its representative upon Mr. Phinney. The defendant in error tries to distort an answer of the witness Stimson into evidence of fraud. Her counsel asks (p. 182):

"Q. You told him it was forfeited and it was not any good to him, or words to that effect?

A. Words to that effect; yes, sir."

If this was a deception it was not willful as appears from the following:

"Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours?

A. Yes, sir.

Q. Now, you didn't mean to tell him an untruth?

A. No, sir

So that, at all events, the agent did not intend to defraud his good friend.

Moreover, it does not appear that what the witness said with reference to forfeiture had anything to do with Mr. Phinney's abandonment of the contract of insurance. On the contrary, that purpose was carried out before the premium fell due, whereas the witness expressed his views as to forfeiture in December or January following (p. 180), at the time, it is true, when the policy was actually delivered over to the witness, but that delivery was not the consummation of the agreement, but evidentiary of it, merely, along with other subsequent circumstances; it occurred very casually. As the witness says, "It came up in a general conversation" (p. 181), whether after or before, Mr. Phinney said "he had no further use for it" (p. 180), does not appear.

Counsel for defendant in error argues that the fraud and deception consists in the representation by the agent that the default of the insured worked a forfeiture in as much as it was a misrepresentation of foreign law and therefore a misrepresentation of fact.

That a foreign law is to be proved as a fact is a proposition not to be disputed. But that is another and quite a different thing from the construction of a foreign statute.

In the case of Cathcart *vs.* Robinson (5 Peters, 263), it is said, to quote from the syllabus:

> "The construction which British statutes had received in England at the time of their adoption in this country, indeed to the time of the separation of this country from the British Empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however, subsequent decisions may be respected, and certainly they are entitled to great respect, their absolute authority is not admitted. If the English Courts vary their construction of a statute which is common to both countries, we do not hold ourselves bound to fluctuate with them."

And in Kline *vs.* Baker, 99 Mass., at page 255, Mr. Justice GRAY says:

> "And when the evidence admitted consists entirely of a written document, statute or judicial opinion, the question of its construction and effect is for the Court alone," citing numerous cases

But we deny that it was a misrepresentation of either fact or law. Whether the statute of New York applied to work a forfeiture was merely a matter of opinion. That it did not apply in this case was the opinion of Mr. Phinney as well as Mr. Stinson; it was the opinion of the company at the time of the abandonement; it is most assuredly the opinion of the company's counsel to-day and, as we hope and believe, it will be found to be the opinion of this Honorable Court.

But the case of Surin *vs.* Baker, recently decided in this Court (150 U. S., 312), settles this point. It was sought to cast upon the complainant responsibility for the loss of goods consigned to him upon the ground that in certain suits upon the insurance policies he had testified that he was the owner. In holding him not responsible, said the Court:

> "Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complaint said in his tes-

timony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. *If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration of admission of fact,* such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument."

See also Latham *vs.* Smith, 40 Ill., 25.

We submit, therefore, that the learned trial Judge erred when he instructed the jury to take into consideration the question whether the agreement was induced by fraud, of which not a particle of evidence existed. (See 29th Exception, p. 344, and 30th Assignment of Error, p. 387.)

The exception to the learned Judge's refusal to charge as requested by counsel for the plaintiff in error:

"*Upon all the evidence in this case you are instructed to find a verdict in favor of the defendant*" (27th Exception, 28th Assignment of Error), *was well taken.*

If the agreement of rescission had been established in the opinion of the jury and they had rendered a verdict in favor of the plaintiff in error, what item of testimony in the whole record would avail the defendant in error to disturb such a verdict? As we have taken pains to point out, no effort was made to controvert the testimony adduced to prove the rescission and abandonment. The facts and circumstances were all conceded or left uncontradicted. Nevertheless the Court left it to the jury as a question of fact by them to be determined. We quote from his charge the portion included in the 30th Exception and 31st Assignment of Error:

"It is a question of fact, therefore, for you to determine from the evidence in the case whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson with that

understanding and whether, relying upon that understanding, the defendant subsequently acted."

This was undoubtedly erroneous. The plaintiff in error having made out a *prima facie* case establishing the rescission, which remained uncontradicted, was entitled to a verdict by direction. In the case of Kelly *vs.* Jackson (6 Peters, 622), the law is thus stated :

"*Prima facie* evidence of a fact is such evidence as in judgment of law is sufficient to establish the fact ; and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No Judge would hesitate to set aside their verdict and grant a new trial if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the Court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such are understood to be the clear principles of law on this subject."

Again :

Lilienthal's Tobacco *vs.* United States, 97 U. S., 268.

"High authority supports the proposition that when a presumption of fact exists against a party in a case of seizure *in rem*, the Court may instruct the jury that the burden is on such party to remove the presumption, and that if it does not, the case must, in an issue in a civil case, go against him on such point.

Whenever evidence is offered to the jury which is in its nature *prima facie* or presumptive proof, its character as such ought not to be disregarded ; and no Court has a right to direct a jury to disregard it, or to view it under any different aspect from that in which it is actually presented."

Dwight *et al. vs.* Germania Life Ins. Co., 103 N. Y., 343.

"If the proof of a fact is so preponderating that a verdict against it would be set aside by the Court as contrary to the evidence, it is the duty of the Court to direct a verdict. It is not sufficient to authorize a submission of the fact to the jury that there is a 'scintilla of evidence' a mere surmise to the contrary."

Kelly *vs.* Burroughs, 102 N. Y., 95.

> "The mere fact that the plaintiff, who testified to important particulars, was interested was unimportant in view of the fact that there was no conflict in the evidence, or anything or circumstance from which an inference against the fact testified to by him could be drawn."

There is no dispute as to the company's *prima facie* case. This is conceded by the Judge who tried the case, or he could not have given it to the jury, for it was the only question of fact which he recognized. *All other questions were disposed of as questions of law.*

3.

THE DEFENDANT IN ERROR IS ESTOPPED TO INVOKE THE PROTECTION OF THE STATUTE.

We contend, therefore, that there was an actual agreement of recission which the Court should have taken cognizance of as being established by uncontradicted evidence and we content that the defendant in error is estopped by that agreement as well as by the acts and conduct of the assured.

The plaintiff in error shows affirmatively that the recission of the contract was the result of the express agreement into which the question of notice never entered. This position is not controverted. The defendant in error does not oppose it. She does not say that failure to pay the premium was in any sense referable to the absence of notice, but invokes the statute on general principles. Her position, however, is entirely untenable according to a decision of the New York Supreme Court in which a policyholder sought to excuse his failure to pay his premium on the ground that the company allowed itself to become insolvent. In denying his claim said the Court :

> "There is nothing in the case to show that the failure to meet the premium was because of the insolvency of the company. If the claimant wishes to be excused from the consequences of his omission

> to perform his part of the contract he must, at least, show his readiness and willingness to perform, and that he refused performance upon the ground that the other party had broken the contract by allowing itself to become insolvent. *There is nothing to contradict the inference to be drawn from the failure to pay the premiums, that the claimant intended to abandon the insurance. Having failed to pay apparently because he saw fit to terminate the contract he is in no position to take a ground not then thought of and assert a demand long since abandoned.*"

In re Attorney-General *vs.* The Continental Life Ins. Co., 64 How. Pr., N. Y., 520.

This case was cited and the language underlined quoted in part and approved by BRADY, P. J., in delivering the opinion of the General Term of the New York Supreme Court in the case of The People of the State of New York *vs.* The Globe Mutual Life Ins. Co., (32 Hun., 147), which case was affirmed on appeal to the New York Court of Appeals upon the General Term opinion (96 N. Y., 666).

The very same principle is recognized by this Court in the case of Railroad Company *vs.* McCarthy (96 U. S., 258, 267), cited and approved in a more recent case, Davis *vs.* Wakelee (156 U. S. 690), to quote from the latter case :

> " Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after the litigation was begun, change his ground, and put his conduct upon another and different consideration. *He is not permitted thus to mend his hold* "

Keeping in view the fact that the insured had a sovereign right to abandon the contract of insurance, of which right no statute could deprive him ; that he came to the company's agent and told him that he couldn't pay the maturing premium ; that he didn't pay it when it matured ; that he didn't place his omission to pay upon the ground that no notice was sent, but upon the ground that he hadn't the cash ; that, indeed, no question of absence or waiver of notice or of notice at all arose to influence

him one way or another ; in view of these facts, was not the agent fully warranted and justified in treating the contract as abandoned by the insured in the exercise of his right and privilege? If the idea of serving the statutory notice ever entered his head, which under the circumstances, is not at all likely, he would naturally and logically have abandoned it on the theory that the statutory requirement applied only to existing contracts, whereas, his was a case in which the contract was rescinded by the voluntary act of the other party to it, and he would have been sustained in what he did by a plentitude of authorities.

"It would not, we apprehend, be insisted, that if the parties, by mutual agreement, had rescinded the contract, a recovery could be had ; and we are not able to perceive any difference, so far as the rights of the parties are concerned, between a recission proper and the termination of the contract in the way mentioned. In either case, the defense to an action brought upon the contract would be full."

Drake *vs.* Goree, 22 Ala., 415.

"A positive and absolute refusal by one of the parties to perform a contract for a purchase and sale of land gives to the other party, as an alternative remedy, the right to assent to such abandonment, and to treat the contract as rescinded."

Graves *vs.* White *et al.*, 87 N. Y., 463.

"That, where one party to an executory contract repudiates it by refusing to be bound by its terms, the other party may take him at his word, and act upon it by treating the contract at an end, and bring an action for damages for its breach, is, of course, elementary. The only question is, what will constitute a repudiation ? The true test, stated generally, is whether the acts and conduct of the party evinced an intention no longer to be bound by the contract ; and the fair result of the authorities is that it is not only an absolute refusal in words to perform a contract, but also any clear manifestation by words or acts of an intention not to perform it according to its terms, that will authorize the other party to treat this as a repudiation and bring his action. * * * Neither did it make any difference, so far as concerned defendant's right to act on this as a repudiation, that it might not have

been willful or fraudulent, but the result of a mistake as to the terms of the contract. In planting themselves on their own construction of it, the plaintiffs took their chances; and, as it was in fact incorrect, they must stand the legal consequences of their acts."

Armstrong *vs.* St. Paul & Pac. Coal & Iron Co. (48 Minn., 119-120).

The right of recission depends, not on whether the conduct of one party was inconsistent with the contract, but whether the conduct of one party to the contract was really inconsistent with an intention to be bound any longer by the contract.

Midland Ry. Co. *vs.* Ont. Rolling Mills, 10 Ct. App., 687.
See also Hennessy *vs.* Bacon, 137 U. S., 78.

What if, to the facts just stated is added that the insured voluntarily gave the policy to the company's agent as a thing of no value; that up to the time when Mr. Stimson left the company's employ, and was succeeded by Mr. Pond, no effort, no attempt was made to get it back; that Mr. Pond never heard of it until about ten months after Mr. Phinney's death, and long after his estate had been administered. If the circumstances preceding and attending the default in payment of the premium could be thought insufficient to establish a voluntary abandonment, the succeeding circumstances, his discarding of the policy and his absolute silence concerning it continuing until his death, *until it was no longer possible to serve the statutory notice, surely worked an estoppel.*

In the case of Davis *vs.* Wakelee, 156 U. S., p. 689, in holding that one cannot obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself and, in a subsequent proceeding in such judgment, claim that it was rendered illegally, said Mr. Justice Brown:

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

See also Davies *vs.* Cornwall, 35 U. S. App., 315; Dodsworth *vs.* Hercules Iron Works, 31 U. S. App., 292.

And again:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after the litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold."

Although in the State of Ohio parol executory agreements for the partition of land made by co-tenants are within the statute of frauds and are not enforceable, yet it has been held (Berry *vs.* Seawell, 31 U. S. App., 30) that such a partition acquiesced in for any considerable length of time, will estop any person joining in it from asserting title or right to possession in violation of its terms.

In that case as in the present there was no question of waiving the statute but the decision went upon the theory that the party, by his conduct, *placed it out of his power to invoke the statute.*

All the elements of an estoppel are present in this case—the voluntary action of the insured, his intention that it should influence the insurer, the fact that it did influence the insurer, and the injury that will result to the latter if the former be permitted to repudiate his action.

The insured, from force of circumstances, abandons the contract of insurance, delivers up the policy and, after nearly two years, dies without having made a move or a sign in repudiation of the abandonment upon the ground

that no notice had been sent, or upon any other ground. True, he asks to have the policy revived and restored, but not as of right but as a favor, and after an application for insurance made by him to another company had been rejected on the ground of his ill health. *Clearly, however, the request was a recognition of the abandonment not a repudiation of it.* Next, the company assents and enters the fact of the abandonment upon its books. In other words, it treats the contract as no longer subsisting and the sending of a notice as logically unnecessary and absurd. Finally there is the injury resulting to the company. It is to be compelled to pay the insurance, simply and solely because notice wasn't sent and the statute requiring notice is said to be mandatory and inflexible, *unless the doctrine of estoppel applies to prevent such a gross injustice to be perpetrated even in the case of a life insurance company. And it does apply.* If the whole conduct of the insured in this case had been the carrying out of a design to defraud the company (and it is difficult to determine motives in any other way than from acts and their natural consequences) what method or scheme would give promise of success greater than that suggested by the acts of the insured in this case, to go to an agent, represent he hadn't the cash to pay his premium, go through the form of asking for an extension, make default, deliver up the policy, and wait. Few agents would think of sending notice even to meet the requirements of a mandatory statute under such circumstances, and the schemer would succeed, *his feeling of security growing with the lapse of time.* This would be preferable to resorting to suicide for the sake of those he holds dear, for he could continue in the enjoyment of life with the refreshing and revivifying feeling that he had provided for them after his death, and his remaining alive would not jeopardize the provision.

Here, what was said in Smith *vs.* New England Mut. Life Ins. Co. (73 Fed. Rep., 772) is peculiarly applicable. We quote:

> "The assured acquiesced in the company's position—that his policy had lapsed—and accordingly neither paid nor tendered subsequent premiums, but treated the policy as a security simply for the interes acquired under the statute. Had his life been continued the claim now made would never have been urged or thought of; his early death alone suggested it. Had he lived ten years longer without payment or tender, this claim would then have been as reasonable as it is now."

A case strikingly applicable to the present is that of Hopkins *vs.* Ins. Co., 78 Ia., 344. The defendant, a fire insurance company, issued to the plaintiff a policy upon certain chattels. It afterwards, through its agent, notified the plaintiff that the policy was cancelled and instructed the agent to return it unearned premiums. The plaintiff assented and proceeded to negotiate for insurance in place of that cancelled. The policy was not formally given up nor was the unearned premium refunded. Nevertheless the Court held that the circumstances disclosed that both parties regarded the policy as annulled. To quote from the opinion:

> "In the case before us the evidence shows that the cancellation was recognized by both the agent of defendant and the assured, and neither party regarded the policy thereafter to be of force. Surely it would be most inequitable for the assured to so speak and act as to induce defendant's agent to believe that plaintiffs regarded the policy as cancelled, and, thus leading them into a feeling of security, induced them not to make formal tender of the unearned premium, and demanded the policy, with proper writing of cancellation endorsed thereon. They are now estopped to set up the non-payment of the unearned premium, after having induced the belief of defendant's agent that cancellation was recognized by them without such payment."

In the case of Shuttle *vs.* Thompson (15 Wall., 151–159), (although that was a case in which the right to waive a statute intended for one's benefit was recognized, and

therefore scarcely on all fours with the theory of the present point, from which, the question of waiver is excluded) the language of the Court is most appropriate. It is as follows :

> " *A party may waive any provision, either of a contract or of a statute, intended for his benefit.* If, therefore, it appears that the plaintiff in error did waive his rights under the act of Congress—if he did practically consent that the deposition should be taken and returned to the Court as it was—*and if by his waiver he has misled his antagonist—if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all. If he may, he is allowed to avail himself of what is substantially a fraud Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a Court whose province it is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud.*"

There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.

Dickerson *vs.* Colgrove, 100 U. S., 578-581.

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.

Swain vs. *Seamens*, 9 Wall., pp. 254, 274.

" It is a sound principle that he who prevents a thing being done shall

not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond."

United States vs. *Peck*. *Peck* vs. *United States*, 102 U. S. Rep., pp. 64, 65.

See also Emerson *vs.* Slater, 22 How. Rep., 28–41.
Thomson *vs.* Ins. Co., 104 U. S., 252–258.
Railroad Co. vs. Trimble, 10 Wall., 367, 383.
Lovell *vs.* St. Louis Mut. Life Ins. Co. 111 U. S., 264, 279.
Ins. Co. *vs.* Mowry, 96 U. S., 544.
Ins. Co. *vs.* Eggleston, 96 U. S., 572, 577.
Storm *vs.* U. S., 94 U. S., 76, 83.

Accordingly, we submit that the defendant in error is estopped by the acts and conduct of her testator.

POINT VII.

Defendant in error did not prove her alleged cause of action, and there was a fatal departure from law to law made in rendering the judgment sought to be reviewed because there were no pleadings for such a judgment to be based upon.

The plaintiff below to be entitled to recover should have established

(*a.*) That she performed the conditions of the contract, which she pleaded in which case payment or tender of premiums was necessary, which was not shown by her.

(*b.*) That she was excused from payment or tender by the failure to send the statutory notice which the plaintiff neither pleaded, nor proved.

A.

The plaintiff alleged that she performed the conditions of the contract, but did not prove payment of premiums after September 24, 1890, or tender thereof.

(1.) *Payment of premiums was not proved.*

The complaint of the plaintiff alleges as a cause of action, that the Company, and the deceased made the contract set out in the complaint; that the deceased and defendant in error complied with the terms thereof, and upon such averments demands judgment.

The terms of the contract alleged are plain and unambiguous. By it The Mutual Life Insurance Company of New York agrees to pay to Guy C. Phinney, his executors, etc., the sum of one hundred thousand dollars ($100,000) provided the said Phinney shall pay the annual premium of thirty-seven hundred and seventy dollars ($3,770) on the 24th day of September in each year for twenty (20) full years, or until his death.

The policy of insurance sued upon in this action is an executory contract. It remains executory until the money payable upon the loss is paid. By it the company agrees to pay the beneficiary a certain sum, *provided* the insured shall make it certain payments at stated intervals.

Mutual Life Ins. Co. vs. Wager, 27 Barbour, 354.

The Supreme Court of the United States has said concerning the nature of such a contract as this:

"It is an entire contract of life insurance for life, sub-
"ject to discontinuance and forfeiture for non-payment of

"any of the stipulated premiums. Such is the form of "the contract, and such is its character. * * * Each "installment (premium) is, in fact, part consideration of "the entire insurance for life. It is the same thing where "annual premiums are spread over the whole life. * * * "The whole premiums are balanced against the whole "insurance."

Ins. Co. *vs.* Statham, 93 U. S., 24 (30).
See also Kellner *vs.* Ins. Co., 43 Fed., 623 (627).

It will not be denied that the general rule as to such contracts is correctly stated as follow: "In mutual "promises, the plaintiff, seeking to charge the defendant, "must aver and prove performance on his part of that "which was the consideration of the defendant's promise, "and this, as well, where the promise of the plaintiff was "to be performed before the day fixed for performance by "defendant as where the performance of the respective "promises was concurrent and dependent."

Loud *vs.* Land Co., 153 U. S., 564.
Phillips Co. *vs.* Seymour, 91 U. S., 646 (650).

Defendant in error seems to have realized the force of this rule, for she alleged in her complaint that she had performed all the conditions of the contract on her part, and that her testator had performed all of the conditions of said contract on his part, and made an ineffectual attempt to prove the payment of the premiums.

Performance on the part of the insured and beneficiary, as alleged in the complaint, means and can mean nothing other than payment of the premiums called for by the policy. It is conceded, or found as a fact by the Court, that these premiums were not paid. No sufficient proof of payment was offered in support of the complaint. The attempt made to show such performance was unsuccessful. For this reason plaintiff in error at the conclusion of the

evidence in chief of the defendant in error moved for a non-suit. The motion was denied by the Court. The same question was also properly raised by a request for the instruction set forth at large in paragraph XIII, specification of errors.

This instruction the Court refused to give, and upon such refusal error was duly assigned.

There was an entire "failure of proof."

"When, however, the allegation of the cause of action "or defense to which the proof is directed is not proved, "not in some particular or particulars only, but in its "entire scope and meaning, it shall not be deemed a case "of variance within the last two sections, but a failure of "proof."

2 Hill's Code of Washington, Section 219.
Chilberg *vs.* Jones, 3 Wash., 534.
Marsh *vs.* Wade, 1 Wash., 545.
Glenn *vs.* Sumner, 132 U. S., 150.

Defendant in error did not insist in the Court below, and cannot insist in this Court, that she succeeded in her attempt to prove the payment of the premiums. The lower Court held that the evidence of performance offered and admitted was insufficient to raise an issue, but she allowed the defendant to recover without any sufficient evidence of performance by reason of the construction given by the Court to the New York statute. When the defendant in error failed to prove performance as alleged, as she attempted to do, the Court should have stopped the case there; and when an amendment in the pleadings was called for and had, should have directed the jury to find a verdict for the plaintiff in error.

(2.) *Tender of premiums was not proved, although performance was alleged. If proof of payment was necessary, tender was of course, necessary.*

B.

Defendant in error (1) neither pleaded nor proved that she was excused from payment or tender by the failure to send the statutory notice.

And (2). Even if the statute had been pleaded it did not relieve the defendant in error from paying or tendering premiums before suit.

(1.)

The defendant in error did not plead or prove that she was excused from payment or tender by failure to send the statutory notice.

It has been shown above that payment or tender of premiums was necessary before suit.

The ground upon which recovery was had was not that the contract was performed, but that the provisions of the statute excused performance.

No principle of code pleading is better settled than that the pleader cannot allege performance and recover upon proof that performance was excused or waiver.

Mr. Pomeroy (Pomeroy's Remedies and Remedial Rights, Sec. 556) in discussing this question, says: "The plaintiff is no longer permitted to aver the performance of the required act, and on the trial prove the circumstances which excuse such performance, or prove any other alternative than the one specially alleged."

See also

Oakley *vs.* Morton, 11 N. Y., 25.
Hudson *vs.* McCartney, 33 Wis., 331.
Lumbert *vs.* Palmer, 29 Ia., 104;
Woolsey *vs.* Williams 34 Ia., 413;
Hand *vs.* Ins. Co., 59 N. W. (Minn.) 538;

Evans *vs* Ins. Co., 31 N. E. (Ind.) 843.
Trainor *vs.* Wouman, 34 Minn., 237; 28 N. W. 401;
Mosness *vs.* Ins. Co., 50 Minn., 341; 52 N. W. 932;
Ins. Co. *vs* Brown, 18 S. W. (Tex.) 713.

In Oakley *vs.* Morton, *supra*, the Court, at page 33, says: "Under an avurment of performances * * * evidence in excuse of non-performance was not admissible and should have been excluded," and the other cases are to the same effect.

In the case at bar, the lower Court held that the evidence of performance offered and admitted was insufficient to raise an issue; but allowed the defendant in error to recover without any sufficient evidence of performance by reason of the force and effect given by him to the New York statute.

The statute of New York was not pleaded nor the failure of plaintiff in error to comply with its provisions, nor was it even referred to in the complaint. Where the relief of the statute is relied upon as an excuse for non-performance, the statute itself becomes a necessary part of the pleading, as well as the non-compliance of the insurance company with its requirements, which relieves against the breach of conditions on the part of the insured.

Rosenplanter v. *Provident Sav. Life Assur. Soc., 91 Fed. 728.*

It is not a question as to whether the court takes judicial notice of the statutes of New York, but rather one of *departure from law to law in the pleading.* All the cases cited by the defendant in error on this point are simply to the effect that the United States Courts take judicial notice of State statutes. This is not the controversy. The controversy is partly whether *facts* were pleaded which made the statute applicable. The plaintiff pleaded he had *paid* all the premiums. If so, the stat-

ute had no applicability. Whether a party who pleads a specific contract and performance on his part of its conditions, as his right to recover shall be permitted after performance has been controverted, to confess his non-compliance and shift his right of recovery to an unpleaded statute of a foreign State and assert non-compliance with its provisions on the part of defendant, and adopt the defendant's non-compliance with the unpleaded statute as his own excuse for non-compliance with the conditions of the contract alleged in his complaint, is the question here. The right of action alleged and then abandoned is the act of the party; that not alleged but relied upon is the act of the legislature of New York. With performance of the conditions alleged the right of action is perfect, regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. *If the statute of New York, instead of performance of the conditions of the contract by defendant in error, affords the ground of recovery, then pleading of the statute is indispensable.*

Union Pacific Railway v. *Wyler*, *158 U. S.*, *285*.

In the case cited, a party sued the railway company for a personal injury, basing his right to recover upon the general law of master and servant. After the cause had been transferred to the Federal Court and remained in litigation for a number of years, the plaintiff amended his complaint so as to bring himself under the fellow-servant act of the State of Kansas. Upon amendment being made, the defendant interposed the statute of limitations as to an original suit begun at the date of amendment. Mr. Justice WHITE, in delivering the opinion of the Court, adopted the following definitions and illustrations of departure:

"Coke upon Littleton, 304 *a* says: 'When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of Parliament. So when in his former plea he intituleth himself generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.'

"Comyn's Digest, 'Pleader' (F. 8.), states the same rule, and gives the following illustrations of departure:

"'In debt on bond by sheriff against his bailiff to pay him 20d. for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for A; defendant rejoins Stat. 23 H. 6, and 3 G. it is a departure; for pleading he has had and rejoining he ought not to pay; and for pleading common law plea, and rejoining a statute. *Balantine* v. *Irwin*, *M.* 4 *G.* 2, *C. B. Fort*, *368*.

"'So, if a man avows, for that A being seized in fee granted to him a rent, and the defendant pleads, nothing in the tenements at the time of the grant, and the plaintiff rejoins that A. was *cestuy que use* in fee, which use is now executed by the statute of uses; this is a departure.' *Pl. Com. 105 b.*

"Chitty on pleading, *1 pp. 674 675*, states the principle as follows: 'A departure may be either in the substance of the action or defence, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament.'

"Stephen on Pleading, *pp. 412*, *413*, thus elucidates the point: 'These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also (*a*) departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law, in his declarations, and

on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoider.'

"Gould on Pleadings, *pp. 423, 424*, says:

"'When the matter, first alleged as the ground of action or defence, is pleaded as at common law, any subsequent pleading by the same party, supporting it by a particular custom, is a departure' (*pp. 290-291*).

And in applying the foregoing rules, says:

"A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the states the laws of other state are treated as foreign laws, which must be pleaded and proven. Sedgwick on Statutory and Constitutional Law, *363*; *Hempstead* v. *Reed*, *6 Connecticut*, *480*; *Swank* v. *Hufnagle*, *111 Indiana*, *453*; *Root* v. *Merriweather*, *8 Bush*, *397*. Although this rule is not invariably adhered to, it is part of the law as administered in the state of Missouri.

Babcock v. *Babcock*, *46 Missouri*, *243*.

"The suit here was brought in a Missouri court, and was necessarily controlled by the law of that state.

"It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in

alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. It is true that the Federal Courts take judicial notice of the laws of the several states. *Priestman* v. *United States*, *4 Dall.*, *28*; *Owings* v. *Hull*, *9 Pet.*, *607*; *Covington Drawbridge Co.* v. *Shepherd*, *20 How.*, *227*; *Cheever* v. *Wilson*, *9 Wall.*, *108*; *Junction Railroad* v. *Bank of Ashland*, *12 Wall.*, *226*. This rule, however, does not affect the present suit, which was commenced in the Court of Missouri. Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes which is a matter of evidence. The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute." (*pp. 295-296.*)

The preserved distinction between legal and equitable

remedies in the Federal courts prevents such a departure as was made in this case. It is not contended one is entitled to insurance without payment at some time and in some form, of the premiums with which the insurance is purchased; it is not claimed that failure to give the statutory notice operates as a payment. How, then, on a complaint that avers performance of all conditions, that is, payment of all premiums, is the common law court to enter into the field of accounting and ascertain what premiums have been paid and what have not, compute interest on the unpaid premiums according to the law of the forum of the State of New York, and render its judgment or decree for whatever equitable balance may be found due? Suppose such a practice adopted where a policy had been issued to a middle-aged person immediately upon the enactment of the statute of 1877, and but a single annual premium paid, and death occurred about this time and an action should be brought upon that policy in the form adopted in this case. The aggregate of unpaid premiums and their accumulated interest would constitute an equitable set-off exceeding the amount of the policy. If, without pleadings framed for the purpose, the plaintiff is entitled to recover, why not the insurance company, the balance being in its favor?

Even if the statute of 1877 had been pleaded, it did not relieve the plaintiff in error from paying or tendering premiums before suit to recover the full insurance.

The complaint is entirely destitute of any allegation of the statute, or of any averment of facts bringing this case within the statute, if it applied.

It is immaterial whether the statute was relied upon contractually, or as a law controlling the contract by reason of other considerations. In either case it was the duty of defendant in error as long as the premiums had not been paid to set up in her complaint the facts bring-

ing the case within the statute, if it applied. Failing to do so, she should not have been allowed to recover by force of the statute.

Where one seeks to maintain a right under a statute, his pleading must state specially every fact requisite to enable the Court to judge whether he has a cause of action arising under the statute.

Austin *vs.* Goodrich, 49 N. Y., 266.
Churchill *vs.* Onerdonk, 59 N. Y., 134.
Railroad Co. *vs.* Sturgis, 44 Mich., 538; 7 N. W., 213.

The terms of the policy sued on would have effectually prevented a recovery, unless aided by the statute as claimed by defendant in answer.

The defendant in error was not entitled to have this statute considered either by the Court or the jury, except upon proper averments in the pleadings of that statute, or facts showing that the statute was applicable.

In the light of these decisions, the necessity of pleading facts to bring the case within the provisions of a statute when the whole success of the case depends upon those provisions, should not be questioned. But what is to be said, keeping these cases in view, as to the necessity of pleading a foreign statute. The case of Baxter *vs.* Ins. Co. (*supra*) relied upon by the other side was the case of the construction of a New York statute by a New York Court, unlike the present in which a New York statute is the subject of a suit brought in a Washington Court. In a case not long since decided in the Supreme Court of Texas the rules recognized in the cases which we have cited are absolutely ignored. The case is Mullen *vs.* Mutual Life Ins. Co. (34 S. W. R., 605).

The Court of Civil Appeals had held that evidence was admissible on the part of the defendant to prove notice and forfeiture though they had not been affirmatively alleged by defendant, where plaintiff had alleged and de-

fendant had denied specifically that the policy was in force at the death of the insured and that the terms of the policy as to the payment of premiums had been complied with. In reversing the judgment based upon this opinion said the Supreme Court:

> "We concede that a plaintiff by making allegations in the petition which are unnecessary, may relieve the defendant of the necessity of either pleading or proving purely defensive matter, but whether the plaintiff in error has done so depends to a large extent, we think, upon the construction to be given to the New York statute incorporated in the contract."

That construction is as given in Baxter *vs.* Ins. Co. (119 N. Y., 454), and is, briefly, that the insured cannot be regarded, in the light of the statute, as in default, until thirty days after notice before the due date in the policy.

"Viewed," says the Court, "in the light of this construction which this Court must accept, it would seem that the plaintiff in error only alleged in his petition what was legally true, and only what was necessary to show a right to recover." We ask, how is a Washington attorney called upon to defend the Company in a Washington Court, to know that what the plaintiff alleges is legally true if it is true only in the light of a foreign statute as to which the petition is silent? "While it is true," continues the learned Court," that he failed to pay two of the matured premiums before his wife's death, yet, in the absence of notice, such failure had no effect upon his legal rights in the premises, and did not constitute a breach of his obligation to pay premiums. It also follows that the allegation that Maud J. Mullen died during the continuance of the policy was legally and literally true in the absence of the notice provided in the New York statute. If we have taken a correct view of the plaintiff's pleadings, as he did not allege anything with reference to notice, he did not thereby relieve the defendant of the necessity of pleading and proving the defense of forfeiture."

The learned Court must, for the moment, have been blind to the fact that Courts cannot take judicial notice of a foreign statute; that a foreign statute must be pleaded and proved in a State Court as a fact; that if, by reason of the foreign statute alone, the policy was in force when the assured died, the defendant, and the defendant's attorneys, practicing in the Courts of the State in which the action was pending, were entitled to be informed of the existence of such a statute as a matter, not of law, but of fact.

When the defendant in error failed to prove performance as alleged, as she attempted to do, the Court should have stopped the case there; and unless an amendment in the pleadings was called for and had, should have directed the jury to find a verdict for the plaintiff in error.

The plaintiff in error contends that the New York statute does not purport to relieve the assured of performance of the condition precedent namely to pay his premium at the time they fell due, nor does it attempt to confer upon him the right to maintain an action upon other terms, or under other circumstances than he would otherwise have it. It does not purport to act upon the contractual rights of the parties to the policy, nor upon their remedies to enforce such rights, except in so far as it prohibits the company's declaring any policy, to which it is applicable, forfeited unless and until a certain notice is sent. Under no circumstances does it give the beneficiary the right to demand performance by the company, that is, payment of the insurance upon any terms other than the performance by the insured, that is, payment of the premiums or tender although he may be by the statute protected from the results which would otherwise follow from failure to pay at the due day.

Therefore, when upon a policy to which the statute is

applicable, a premium matures and is not paid and no notice is sent, the policy continues in force and the assured has the right to pay the premium at a day subsequent to the due date, and the beneficiary to demand performance at the maturity of the policy, *upon payment or tender of accrued premiums.*

The statute does not purport to relieve the insured from the payment or tender of premiums, but only to provide a method of forfeiture.

Because the statutory notice has been sent, it may follow from the terms of the statute there applicable, that the hand of the company is stayed from declaring the policy forfeited, but rights of the parties to the contract are otherwise unaffected by the the statute.

The payment of the premium is a *condition precedent* to the continued existence of the contract. It is not an obligation. The effect of the non-fulfillment of this condition is to render the contract void.

The parties to such a policy, therefore, are in just the same position by virtue of this statute, in cases to which it is applicable, as they would be if the hand of the company were stayed from declaring a forfeiture of the policy by reason of conduct on its part amounting to a waiver of payment of the premium at the due date.

The company has a right to forfeit the policy by the giving of the prescribed notice if the statute is applicable; by failing to give such notice it simply waives the right of forfeiture. In no sense does it waive its rights to be paid its premium before being called upon to perform. Notwithstanding the New York statute, therefore, and even if it be held that it is applicable to, and governs this contract, there became due from Mr. Phinney to the company on September 24, 1891, a premium of thirty-seven hundred and seventy dollars ($3,770), and such premium remained due at the beginning of this action.

The Supreme Court of the United States has decided this question in accordance with the contention of the plaintiff in error.

Thompson *vs.* Ins. Co., 104 U. S., 252 (260).
Insurance Co. *vs.* Unsell, 144 U. S., 439 (447).

In the case of Thompson (*supra*) it was contended by the beneficiary under the policy that the company had waived forfeiture for the non-payment of the premiums at the due date, and relying upon such waiver, action was commenced without payment or tender of the premium; and the Court in discussing this question says: "A fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has therefore failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied on had been sufficiently favorable to pave the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all."

In the Unsell case (*supra*) the beneficiary relied upon a waiver as excusing payment of the premium at the time the same was due, and as defeating the right of the company to forfeiture; but there was evidence in this case that payment of the premium had been tendered subsequent to the due date. In discussing this question, Justice HARLAN, at p. 447, says: "If the plaintiff had sued on the policies or certificates *without having paid or tendered the amount due to the company*, the non-payment of which, at the time stipulated, was relied on to prove that the policies had become forfeited, that *fact*

would have been fatal to a right to recover, in any view of the case."

These authorities and binding decisions establish the principle that where the beneficiary relied upon some act or omission of the company preventing forfeiture, no action can be maintained except upon payment or tender of the premiums due; and we submit that the Court committed reversible error in refusing to give the instructions set out in paragraphs IX and X of the Specification of Errors.

Counsel for the plaintiff in error are not unmindful of the fact that the views presented in this brief on the subject of tender and performance are in conflict with the decision of the Court of Appeals of the State of New York, in which case, however, three Judges out of seven dissented.

Baxter *vs.* Ins. Co., 119 N. Y., 450.

But we submit:

1st. That the case at bar cannot be distinguished from the Thompson and Unsell cases, and that this Court will follow the decisions of the Supreme Court of the United States, rather than the decisions of the Court of Appeals of the State of New York in the application of the principle here contended for.

2d. That the decision in the Baxter case was not in this respect a construction of the New York statute, but a decision upon a question of practice and pleading in the State of New York, and upon the general principles of the law of contracts, and a Federal Court is, therefore, not bound thereby. That Court does not reach its conclusion that a tender is unnecessary before beginning suit by reason of anything contained in the New York statute. The statute is silent as to how the rights it attempts to preserve may be enforced. All that is left by the statute

to the general principles of the law of contracts. In the application of the general principles of the law of contracts to the facts of a particular case, the Federal Courts exercise an independent judgment and follow their own convictions. This has been expressly decided with regard to insurance contracts.

Carpenter *vs.* Ins. Co., 16 Peters, 495 (511)

Although the effect of a State statute may be involved, still if the question presented is one of general law, the Federal Courts are not bound by the construction placed upon such statute by the State Courts.

Venice *vs.* Murdock, 92 U. S., 494.

In the case the Court says, at p. 501:

"It is argued, however, that the New York decisions "are judicial constructions of a statute of that State; and, "therefore, that they furnish a rule by which we must be "guided. The argument would have force if the decisions, "in fact, presented a clear case of statutory construction; "but they do not. They are not attempts at interpreta- "tion. * * * They assert general principles, to wit: "that persons empowered to borrow money and give bonds "therefor, for the purpose of paying it to an improve- "ment company, are not authorized to deliver the bonds "directly to the company; a doctrine denied in this "Court. * * * They assert, also, that where an au- "thority is given to an officer to execute and issue bonds "(on the assent to be obtained by the voters of a town, "the assent to be obtained by the officer and filed in a "public office, with an affidavit verifying the assent), the "verification amounts to nothing, subserves no purpose, "and that a *bona fide* holder of the bonds is bound to "prove that the requisite number of voters did actually "assent. They assert this as a general proposition.

"They do not assert that the statute so declares, or that "such is even its implied requisition. *There is, there-* "*fore, before us no such case of the construction of a* "*State statute by State Courts as requires us to yield our* "*own convictions of the right and blindly follow the lead* "*of others, eminent as we freely concede they are.*"

See also Watson *vs.* Tarpley, 18 Howard, 517 (520).
Liverpool Steam Co. *vs.* Phenix Ins. Co., 129 U. S., 397 (443).

The decision in the Baxter case, that it is not necessary to plead the statute, or the facts bringing the case within the statute, or to tender the past due premiums, simply establishes principles of practice and procedure for the State of New York, and is therefore in no way binding upon this Court, or upon a Circuit Court sitting in the State of Washington.

By Section 914 of the Revised Statutes of the United States the practice of Circuit Courts in law cases is assimilated to the practice of the State in which the Court is sitting. The Supreme Court of the State of Washington has expressly withheld its approval of the rule laid down in the Baxter case so far as it decides that the beneficiary may sue without payment or tender of past due premiums.

Griesemer *vs.* Ins. Co., 10 Wash., 202 (211).

In which the Court says (page 211): "We have decided "this latter case without regard to the case of Baxter *vs.* "Brooklyn Life Ins. Co., 119 N. Y., 450 (23 N. E., 1048), "in which it was held by a majority of the Court that the "premium was not due in the sense that the company "could derive any advantage from its non-payment until "after the notice required by the statute had been given, "for the reason that the minority of the Court in its dis- "senting opinion has presented such arguments as to "make us doubt the correctness of the decision.

The dissenting opinion in the Baxter case was as follows:

"ANDREWS, J. (dissenting): I dissent from the prevailing opinion "in this case. The sole purpose of the statute of 1877, a purpose indi- "cated as well by the title as the body of the act, was to abrogate the "rule that the failure to pay the premium on a life policy on the day "specified therein created a forfeiture, and rendered the policy void. "The act, therefore, provided that non-payment of the premium at the "day should not work a forfeiture, and that the policy should continue "in force, notwithstanding such omission, until notice by the company "and default of the insured for thirty days thereafter to make pay- "ment. The construction placed on the statute in the prevailing "opinion, that by its operation the premium does not become due until "after notice and expiration of the thirty days, and that meanwhile an "action may be brought and a recovery had on the policy, although "the premium is due from the time it becomes due according to the "terms of the policy, and remains due at all times thereafter until "actually paid, but under the statute default in making payment at the "pay-day, nevertheless, leaves the contract of the company subsisting, "and an action may, therefore, be maintained upon it in case of the "death of the insured, unless it is shown that the notice has been "given and that the premium was not paid within thirty days there- "after."

"But it is a condition precedent to the maintenance of such action "that the plaintiff must before suit brought have paid or tendered the "premium unpaid. The plaintiff under the statute of 1877, is not re- "quired as before to show that it was paid or tendered on the day fixed "in the policy, but he must aver and prove that payment was made at "some time before the action was commenced, or else no right of ac- "tion has accrued. This is in accordance with the well-settled rule "that in mutual promises the plaintiff seeking to charge the defendant, "must aver and prove performance on his part of that which was the "consideration of the defendant's promise, and this as well where the "promise of the plaintiff was to be performed before the day fixed for "performance by the defendant, as where the performance of respective "promises were concurrent and dependent. The construction I have "given to the statute of 1877 fully accomplishes its purpose while re- "lieving it of the anomaly that a contract to pay an insurance on con- "dition of the payment of the premiums may be enforced, although the "party claiming performance has never paid or offered to pay what was "stipulated.

"The cases in Massachusetts and other States have, I think, no bear- "ing upon the present one. They were well decided, and involved no "such question as is presented in this case under the statute of "1877."

3d. The Baxter case, although emanating from a distinguished and learned Court, was decided by a divided Court, four Judges voting for affirmance and three for reversal; and the dissenting opinion of Judge Andrews, concurred in by Judges Earl and Gray, is a strong argument in favor of the correctness of the views above expressed.

POINT VIII.

The judgment should be reversed.

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APPENDIX.

NEW YORK PREMIUM NOTICE STATUTES.

L. 1876 Ch. 341 (May 15, 1876).
amended by
L. 1877 Ch. 321 (May 23, 1877).
repealed by
L. 1892 Ch. 690, Sec. 295 (took effect Oct. 1, 1892).
new statute enacted by
L. 1892 Ch. 690, Sec. 92 (took effect Oct. 1, 1892).
amended by
L. 1897 Ch. 218 (took effect Apl. 8, 1897).

LAWS OF 1876.

CHAPTER 341.

AN ACT regulating the forfeiture of life insurance policies.

Passed May 15, 1876.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last

known post office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy.

SEC. 2. The affidavit of any officer, clerk or agent of the company that the notice to the assured, provided for in Section, one has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notice having been duly given.

SEC. 3. This act shall take effect immediately.

LAWS OF 1877.

CHAP. 321.

AN ACT to amend chapter three hundred and forty-one of the laws of 1876, entitled "An act regulating the forfeiture of life insurance policies."

Passed May 23, 1877.

THE PEOPLE OF THE STATE OF NEW YORK REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled 'An act regulating the forfeiture of life insurance policies, is hereby amended so as to read as follows:

SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium

or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given.

CHAPTER 690, SEC. 92.

SEC. 92. *No forfeiture of policy without notice.* No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to surrender value or paid-up policy as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited

or lapsed, until the expiration of thirty days after the mailing of such notice.

The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section, has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given.

(The above act in § 295 also repealed the acts of 1876 and 1877.)

LAWS OF 1897.

CHAP. 218.

(This act amended § 92 above as follows:)

"SEC 92.—NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall within one year after the default in payment of any premium, installment or interest declare forfeited or lapsed—any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment

has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

SEC. 3. This act shall take effect immediately."

Supreme Court of the United States

October Term, 1897.

EX PARTE. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION, PETITIONER.

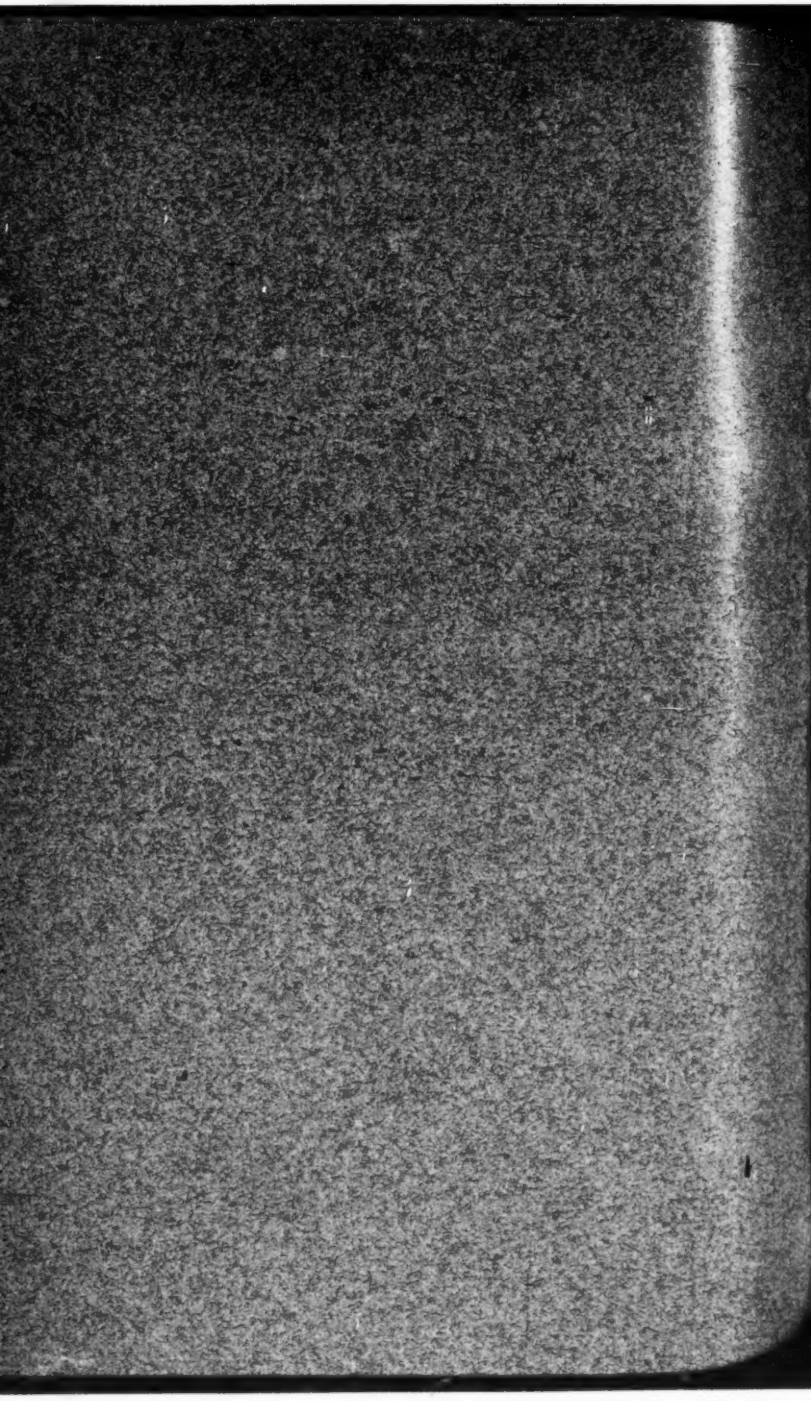
Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court for Its Review and Determination the Case of The Mutual Life Insurance Company of New York, Plaintiff in Error, vs. Nellie Phinney, Executrix of the Estate of Guy C. Phinney, Deceased, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, OPPOSING PETITION FOR CERTIORARI.

S. Wadhurtin,
Attorney for Defendant in Error.

A. F. Burlingame,
Of Counsel.

Judd & Detweiler, Printers, Washington, D. C.



IN THE

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STATEMENT.

The above-named respondent brought an action against the petitioner on a life insurance policy issued on the life of her deceased husband. The case was tried before the Honorable C. H. Hanford, in the circuit court of the United States for the ninth circuit, district of Washington. The respondent recovered judgment, and the petitioner claims it sued out a writ of error in the circuit court of appeals for the ninth circuit. The respondent made a motion to dismiss the writ of error on the ground, among others, that the writ of error had not been filed in the lower court. This motion was argued before the circuit court of appeals,

and at the same time the case was argued upon its merits. The circuit court of appeals, after having taken both matters under advisement, dismissed the writ of error on the ground that there was no evidence that the writ of error had been filed in the court below, and that it therefore had no jurisdiction to consider the merits of the case.

The original writ of error had no file-mark nor anything else upon it to indicate that it had ever been filed in the court that tried the cause. Neither the appearance or fee docket had any entry showing that the writ had ever been filed. On the contrary, it clearly showed in a negative way that such writ had not been filed in that court. Every other paper in the case, numbering over one hundred, that should be filed was entered in such books as having been filed and a fee charged for the same. (See Record, pp. 426–435.) Only an inspection of the above record, which is an exact copy of the appearance docket and fee book, together with the fact that there was no file-mark on the original writ, will show how significant these facts are. Petitioner undertook to supply this record not by writ of certiorari, but by affidavits.

It is true, as stated in the petitioner's brief, that the second premium on the policy of insurance on the life of Guy C. Phinney was not paid. It is equally true, according to the testimony of petitioner's witness, that Guy C. Phinney wanted to pay the premium; that he tendered the company the premium. It is likewise true that the company refused to accept the premium, it wanted to forfeit the contract—wanted to get rid of the risk—because, in the language of the agent, it considered him "a very bad risk." (See letter of agent, Record, pp. 187, 188.)

Why should the petitioner complain because it did not get a premium it refused to take? We will make a fuller statement of the facts relating to the merits in the latter part of the brief, though we think the merits of the case cannot be considered on this application, and will only do so because petitioner has seen fit to enter that field, making it incumbent on us to do so.

Argument.

This is one of that class of cases made final in the circuit court of appeals, except when certified up by such court or when required to be certified up by this Court.

It has been settled by the decision of this Court in a number of cases that this is a "branch of its jurisdiction "which should be used sparingly and with great caution, "and only in cases of peculiar gravity and general impor- "tance or in order to secure uniformity of decision." In view of the statute as construed by this Court this present application for a writ of certiorari should be denied for the following reasons:

I. It has been held repeatedly by this Court that it was the filing of the writ of error in the court which rendered the judgment that gave this Court appellate jurisdiction. In Brooks *vs.* Norris this Court, speaking through Chief Justice Taney, uses this language:

"The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the records from the inferior to the appellate court, and the power of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may be issued by the clerk, or the day on which it is tested, are not material in deciding the question."

Brooks *vs.* Norris, 11 Howard, 204, on p. 208.

To the same effect are the following decisions:

Mussina *vs.* Cavazos, 6 Wall., 355, 363.

Cummings *vs.* Jones, 104 U. S., 419.

Scarborough *vs.* Pargoud, 108 U. S., 567 (2 S. C. R., 877).

Pollys *vs.* B. R. Imp't Co., 113 U. S., 81 (5 S. C. R., 369).

Credit Co. *vs.* R'y Co., 128 U. S., 258 (9 S. C. R., 107).
Farrar *vs.* Churchill, 135 U. S., 609 (10 S. C. R., 771).
U. S. *vs.* Baxter, 51 Fed. (C. C. A), 624.
U. P. R'y Co. *vs.* C. E. R'y Co., 54 Fed. (C. C. A.), 22.
Warner *vs.* T. & P. R'y Co., 54 Fed. (C. C. A.), 920, 921, 922.
Stevens *vs.* Clark, 62 Fed. (C. C. A.), 321.
Threadgill *vs.* Platt, 71 Fed., 1.
Crippin *vs.* Livingston, 12 Fla., 638.
Wright *vs.* Hughes, 2 Green (Iowa), 142.

It is provided in section 11 of the act of March 3, 1891 (see 517) the act established by the circuit court of appeals:

"All provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit court of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error and the conditions of such allowance as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

THE PETITIONER ADMITS THE LOWER COURT CORRECTLY HELD THAT THE WRIT MUST BE FILED.

The petitioner admitted in its petition for rehearing before the circuit court of appeals that "a writ of error is not brought until it is filed with the court to which it is addressed and whose record is thereby to be removed."

Petitioner's brief on rehearing, Record, p. 457.

Thus it is seen that no complaint is made of the decision of the circuit court of appeals that its jurisdiction did not attach until the original writ of error was filed with the clerk of the lower court. Its only complaint is that the court wrongfully decided that there was not sufficient evidence in the record that the writ of error was filed with the clerk of the court that tried the case.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS HOLDING THAT IN THIS PARTICULAR CASE THERE WAS NO EVIDENCE OF THE FILING OF THE WRIT DOES NOT RAISE A QUESTION OF SUCH PUBLIC IMPORTANCE AS TO GIVE THIS COURT JURISDICTION TO ISSUE ITS WRIT OF CERTIORARI.

It being admitted that it was the filing of the writ which gave the circuit court of appeals jurisdiction, no complaint is made of the circuit court of appeals for so holding; then it follows that the only complaint that can be made, the only question that is to be considered by this Court, is: Does the decision of the circuit court of appeals holding that there was no evidence of the filing of the writ raise a question of grave public importance or is it one in which there is a conflict in the decisions of the court? Both of these questions must be answered in the negative.

(*a.*) It was the intention of Congress that the circuit courts of appeals should have final jurisdiction in a certain class of cases of which this is one, except in extraordinary instances. This being true, it would seem that, if the decision of the circuit court of appeals is to be final in any matter, its decision that a record of a lower court is not properly before it for review ought to be in that category. Is this Court going to make its writ of certiorari serve the purpose of a writ of mandamus and compel the lower court to consider a

case on its merits when such court has decided that the party in attempting to sue out its writ has failed to do the one necessary act to give it appellate jurisdiction, viz., file the writ? The second section of the act establishing the circuit courts of appeals provides that each circuit court of appeals "shall prescribe the form and style of its deal and "the form of writs and other process and procedure as may "be conformable to the exercise of its jurisdiction as shall "be conferred by law."

In other words, each circuit court of appeals has complete power to regulate the practice and procedure in its own court and compel a compliance therewith on pain of dismissal. The decision attacked is one regulating the practice in the ninth circuit court of appeals of suing out a writ of error to a court within its circuit. It requires the filing of the writ and preserving the record thereof. The petitioner is in exactly the same condition had it violated any other rule of the circuit court of appeals and had suffered a dismissal therefor.

Instead of being a question of great public importance we cannot imagine a more simple question nor one of less importance to the public at large. The law once being settled (and it has been settled many years by numerous decisions) that it is necessary to file the writ, every lawyer knows that the best evidence of such filing is the propor endorsement of such fact on the writ, and it will always be secured by the careful lawyer. Every lawyer preparing for the review of a cause in the circuit court of appeals gives his precipe for the desired record and carefully examines the same after it is prepared. It is the duty of such lawyer to see that it is properly prepared. If it does not contain all the matter desired, he has the power by mandamus, etc., to compel its correct preparation. By what right or reason, then, can a party complain if his writ is dismissed if he has failed to preserve any evidence of the filing of such writ, especially when

the filing of such writ is jurisdictional? If this writ of error was filed in the lower court, as claimed by petitioner, then both attorneys and clerk were very careless about preserving the evidence of it. Is the question of whether this particular writ was filed or whether there was carelessness in preserving evidence of it, one of great public importance? It may be to the litigants in this case, but cannot be to the public generally. If this Court should cause a writ of certiorari to issue and finally decide that there was sufficient evidence of the filing this particular writ, what particular rule of law important to the public would it decide? None whatever. Between what courts are there conflicting decisions that it would settle? None whatever. Did the clerk of the lower court refuse to indorse the writ as filed? No. Did the attorneys request the clerk to file the writ? No such request was made. Did the attorneys file a præcipe or deliver to the clerk a præcipe for the filing of the writ? No such claim is urged.

II.

NO CONFLICT IN THE DECISIONS.

Petitioner has not undertaken to show, nor could it successfully, that there was a conflict in the decisions of the various courts of appeals such as would give this Court jurisdiction to issue its writ of certiorari. It has thus failed to bring this cause within any of the rules laid down by this Court under the act of Congress as construed in the cases of American Construction Co. *vs.* R. R. Co., 148 U. S., p. 372; Law Ow Bew *vs.* United States, 144 U. S., p. 47; *In re* Woods, 143 U. S., p. 202.

III.

THE CIRCUIT COURT OF APPEALS COMMITTED NO ERROR IN DISMISSING THE WRIT OF ERROR, AS THERE WAS NO EVIDENCE THAT THE WRIT HAD BEEN FILED.

As we have already shown, the dismissal of the writ of error raises no question of sufficient importance to give this Court jurisdiction to issue its writ.

But, we take it, in no case would this Court issue its writ unless petitioner shows *prima facie* error.

We will very briefly discuss the points, and will attach to this brief the brief used in the court below, and earnestly ask the Court's attention to it, if it should consider this phase of the case.

It is admitted that writ of error must be filed or lodged with the court wherein the case was tried.

Then the only question open for discussion is, Was there evidence of such filing in the record before the circuit court of appeals? We say there was none.

The law provides that the original writ of error shall be annexed to the record and returned to the circuit court of appeals. It is admitted that writ of error had nothing upon it to show that it had been filed in the lower court. It is also admitted by petitioner that the indorsement of the filing of the writ on such writ would be the best evidence. This is wholly wanting. What other evidence is there that it was ever filed or even lodged with the lower court? We say, none. Petitioner claims that it is shown in two ways: The affidavit of the clerk of the lower court, filed in the circuit court of appeals, shows that fact, and that the citation reciting therein that writ had been filed is evidence of such fact; also that the return of the clerk reciting the fact that the fees for transcribing had been paid.

1. *The affidavit of the clerk of the circuit court should not have have been considered by the circuit court of appeals, nor can it be considered by this Court.*

If the record before the circuit court of appeals was incomplete (and it is admitted by counsel that it was, in not affirmatively showing the filing of the writ), there was one way, and one way only, to supply the omission, and that was by suggesting a diminution of the record and applying for a writ of certiorari to complete it. By obtaining a proper return to such writ, such omitted facts would then become a part of the record.

It would be a strange, yes, dangerous, rule that would allow parties to supply records by affidavits. Take this case, for example. The matter of the dismissal came on for hearing on the 4th day of May, 1896. On that day, without any notice to defendant in error, petitioner filed the affidavit of Mr. Hopkins, the clerk; Mr. Strudwick, one of the attorneys of record, and Mr. Quilter, deputy marshal, to complete and supply facts not otherwise appearing of record. (See Record, pp. 414, 418, and 420.) It is not by the record proper, but upon the affidavits of these parties, especially that of Mr. Hopkins, that the petitioner relied to show that the writ of error was in fact filed. To state these facts is really all the argument needed to show that such extraneous matter must be disregarded.

If one fact can be supplied in such a manner, then any other matter can be brought into the record in the same way. Supposing a party neglected to show the necessary jurisdictional fact of diversity of citizenship, could such party supply it in the appellate court by affidavit? Supposing a defendant in error moves to dismiss a writ of error on the ground that he was not served with a citation, and the record failed to show that fact, could it be supplied by affidavits of the clerk or marshal that such a citation was in fact issued and served on defendant in error? Certainly

not. The only way would be to suggest a diminution of the record, obtain a writ of certiorari, and in that manner bring any omitted part of the record of the lower court into the record of the appellate court.

We are not without authority on this proposition. The same thing has been attempted before in this Court, and such matters not properly in the record have always been disregarded. On this question Chief Justice Taney, speaking for the Court, says:

"*Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record as certified and returned by the clerk of the circuit court can be received here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court.*" (Hudgins *vs.* Kemp, 18 How., 530, 534.)

"The clerk is not to blame for not doing what he was not requested to do, nor for not doing, whether requested or not, what it was counsel's duty to do:

"'The fact that the clerk of the circuit court in preparing transcripts on appeal to this Court labored under a mistake as to the time within which the transcripts were required to be filed is not a valid excuse for a failure to file them within the time prescribed by the established rules.' (Richardson *vs.* Green, 130 U. S., 104; 9 S. C. R., 443.)

"*And this Court cannot in support of its jurisdiction rely upon any recital in the petition for writ, order allowing writ, or even in the clerk's certificate, if such recital is unsupported by the original writ. The clerk cannot make a record of what is not a record. That any matters are certified by the clerk does not make them part of the record* (Reed *vs.* Marsh, 13 Pet., 153; Fisher *vs.* Cockrell, 5 Pet., 248, *254*), and if the clerk cannot by certifying it make that of record which is not, *certainly counsel cannot patch up a record by recitals in draft orders, bonds, or other papers. A recital in a citation, even that an allowance of an appeal was obtained at a certain time, does not prove the fact.* (Edmondson *vs.* Bloomshire, 7 Wall., 306, *313*.)

"So in Sage *vs.* R. Co., 6 Otto, 712–'16, the Supreme Court says:

"'It is true that the bond accepted in this case recites an allowance of an appeal in open court, *but this is mere sur-*

plusage, etc." "The return of process contained in the record on appeal must control, etc. *No presumption can be indulged that there was some other and different service of process* made from that which appears in the record.' (Lonkey *vs.* Keys S. M. Co., S. C. of Nevada, and cases cited, 17 L. R. A., 351.)

"Presumptions cannot controvert facts, and there are no presumptions in favor of the jurisdiction of the United States courts.

"'*An unnecessary statement in the marshal's return is not conclusive of the court's jurisdiction.*'"

The Lindthrup, 70 Fed., 718.

This being the well-established practice, it comes with very poor grace on the part of petitioner to complain of the clerk in not giving plaintiff in error a perfect record. It had it within its power to get a perfect record if one existed. It has no one to blame but itself if it failed in getting the whole of the record before the appellate court. The very fact the clerk was willing to make affidavits, etc. (a purely voluntary act, wholly outside of his official duties), to be used for the purpose of supplying defective records, shows he was not in any sense acting in bad faith or refusing to give a petitioner such record as it desired.

In the State of Florida the C. H. Phosphate Company, 70 Fed. (C. C. A.), 883, 885, the Court uses language quite appropriate for this case, wherein it says:

"It is claimed that this failure to file the order of enlargement was a neglect of the clerk of the lower court, for which the appellant is not responsible. We cannot assent to this. * * * *It was not the business of the clerk of the circuit court to obtain such an order, file it in his office, or transmit it to the court, but it was the duty of the appellant not only to procure the order, but to see to the proper lodgment of the same.*"

See also Warner *vs.* T. & P. R. Co. (54 Fed., 920):

"It is no part of the clerk's duty as clerk to procure the allowance of writs of error and the approval of bonds for appeals for writs of error. This is the office of parties or of

their attorneys and solicitors. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary indorsement on the writ of error. He relied on the clerk to do for him what the clerk was under no official obligation to do."

2. THE FACT THAT THE WRIT WAS ATTACHED TO THE RECORD IS NO EVIDENCE THAT IT WAS FILED IN THE COURT BELOW.

There is one other proposition we desire to call to the Court's attention, which was discussed and urged strenuously by petitioner in the lower court (though omitted here, Judge Gilbert bases his decision largely upon it, and in that way it is here presented)—that is, the original writ was attached to the record which was transmitted to the circuit court of appeals, and therefore, as claimed by petitioner, must have been filed in the lower court. If the clerk of some other court than the clerk of the court which sent up the record had prepared the writ ready for delivery, then there might be some ground for saying it had gotten into the hands of the plaintiff in error, and by it filed with the court which tried the case; but these are not the facts. Mr. Hopkins, the clerk, prepared the writ ready for delivery to the plaintiff in error. There is no evidence that he ever delivered it to the plaintiff in error or its attorneys, and it was by them returned to such clerk and filed by or with such clerk, nor is there any presumption of such a fact. The only thing shown by the fact that the original attached to the record was transmitted to the appellate court is that at some time such writ was in the hands of the clerk of the court below prior to the time the record was transmitted. But such was the case when the clerk had prepared it, signed it under the seal of the court, and was allowed by the court, ready for the delivery to the plaintiff in error. This does not show it ever got into the hands of the plaintiff in error, and that it delivered it to the clerk of the lower

court for filing, and that the clerk filed it; all of which is jurisdictional and must be done, and which facts must appear of record. It has always been held that jurisdictional facts must affirmatively appear in the record.

3. EVEN IF THE AFFIDAVIT OF THE CLERK COULD BE CONSIDERED A PART OF THE RECORD, IT DOES NOT SHOW THAT THE WRIT WAS FILED.

Even if affidavit of the clerk is considered a part of the record, it and the record show conclusively that in fact the writ was not filed. On this proposition we will simply refer this Court to the decision of the circuit court of appeals, found on pages 138–146 of the Record. We also earnestly ask the Court's attention to the annexed brief, used in the court below, pages 34–50.

4. IF THE COURT SHOULD BE OF THE OPINION THAT THERE WAS EVIDENCE OF THE FILING OF THE WRIT, YET THERE IS NO EVIDENCE SHOWING WHEN IT WAS FILED.

The citation in this case was served on respondent (defendant in error) shortly after it was issued. Before appearing, counsel examined the record, both in the lower court and upper court, to see if the writ of error had been filed. It could find no record of such writ having been filed, much less the date of such filing. It found by such search that the citation was improperly issued, because no citation could issue until the writ was filed. A party cannot be compelled to appear in an appellate court until such appellate court has jurisdiction, and we have shown *supra* that it is the filing of the writ that gives the appellate court jurisdiction. Defendant in error having found no writ of error was filed and that the citation was therefore without force or effect, appeared specially and moved to dismiss.

Again, if the writ of error was filed after the issuance of

the citation (and surely there is no record showing that it was filed before), such citation would be useless and void and could be disregarded, as it was by defendant in error appearing specially, as she did, and moving to dismiss. Of course, it is contended that the affidavit of the clerk establishes the date and the alleged filing, but we have already shown *supra* that such affidavit must be disregarded by this Court. Our discussion of the foregoing points made on the motion to dismiss in the court below has been brief, and we again ask the Court's attention to the annexed brief, which was filed in the court below and which discusses the points far more fully.

STATEMENT ON MERITS.

We think the portion of petitioner's brief and petition relative to the merits of the case is not properly before this Court on this application. But, if it is not too great a burden on this Court, we are glad that petitioner saw fit to open this door, because this Court will see that even had the case been considered on the merits, the result would have been the same. The circuit court of appeals had the merits before it when it dismissed the case, the appearance of defendant in error being special.

In the following statement we shall assume that witnesses of the petitioner told the truth and will treat its story as the correct one.

In September, 1890, Guy C. Phinney applied to petitioner for a policy of insurance in the sum of $100,000. The application contained this provision: "*This application is made "to the Mutual Life Insurance Company of New York, subject "to the charter of the company and the laws of the State of New "York.*" (See Record, p. 7, application.) Upon this application the policy in question was issued. By the terms of the policy the application was made a part of it. The policy further provided that the place of the performance of the contract was the city of New York, State of New York. All these matters were inserted in the printed part of the application and policy by the petitioner. By what right or reason can it complain if the lower court gave full force to the provisions thus inserted in the contract by the company presumably for its own benefit?

The payment of the first premium on the policy is admitted by petitioner.

The following are the facts relevant to the attempted payment on the part of the insured of the second premium, as

related on the witness stand by the company's representative:

About ten days before the second premium became due, Mr. Phinney called to arrange for its payment. He told the agent that he did not have the cash with which to pay the premium, but desired him to take his note for the full amount for thirty or sixty days. (It was already in evidence that he had paid part of the first premium by note.) The agent informed him that he could not take his note for the second premium, as he must respond to the company with cash, but requested Mr. Phinney to get the money with which to pay this second premium; that thereupon Mr. Phinney left him, and returned again about four days before the due date of the second premium and again requested the agent to accept his short-time note in payment of the premium; that again the agent informed him that he could not take his note, but that Mr. Phinney must get the cash; that within thirty days after the due date of the premium several like conversations occurred between Mr. Phinney and the agent, each time Mr. Phinney pressing the agent to accept his short-time note and each time the agent instructing Mr. Phinney to get the cash; that at the end of thirty days Mr. Phinney, having secured the money, tendered the second premium to the agent. The agent then refused to take the second premium until Mr. Phinney should secure a certificate of good health. Mr. Phinney informed the agent that he was unable to get such a certificate. It might be well to here remark that no evidence was offered to prove that during this transaction the health of Mr. Phinney had become impaired, nor could such a fact have been established had it been attempted. (Record, pp. 260, 265.)

About this time the agent returned a number of receipts to the general agent at San Francisco enclosing a letter of which the following is a copy:

"SEATTLE, WASHINGTON, *Nov.* 26, 1891.

"A. B. FORBES, Esq., *Gen'l Ag't.*

"DEAR SIR: In compliance with your request, I regret having to return the undernoted renewal receipts:

"422,198, Phinney. (Offered to pay, but in ill health.)

"Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipt asked for) will be reported in next acc't.

"Yours very truly, F. L. STINSON."

(Record, page 187.)

It will be observed in the above letter that the agent instructed his general agent that he expects to reinstate a number of the policies mentioned in his letter. About the time this letter would reach New York, back comes a telegram from New York to Mr. Forbes, general agent, which he repeats to Mr. Stinson, at Seattle. Mr. Stinson replied to this telegram by letter, repeating the telegram, as follows:

"SEATTLE, WASHINGTON, *Dec.* 10, 1891.

"A. B. FORBES, Esq., *Gen'l Ag't.*

"DEAR SIR: Your wire of the 9th inst., reading 'If tendered, decline acceptance September premium No. 422,198, Phinney,' duly received.

"*This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.*

"Yours very truly, F. L. STINSON."

(Record, p. 188.)

These letters, written at the time, show conclusively:

(1.) That Mr. Phinney actually tendered the second premium.

(2.) It shows equally conclusively that the company, for reasons best known to itself, was desirous that Mr. Phinney's policy should be forfeited.

One of the reasons that the company were so anxious to terminate Mr. Phinney's risk is suggested by a report made to the company by its inspector of risks, of which the following is a copy:

"No. 422,198; amount, $100,000.
"Name: Guy C. Phinney.
"Residence: Seattle, Washington.
"Business: President City National bank.
"Date of investigation: January 22, 1892.

"*Remarks.*

"Financially, all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

"(Signed) STARK."

(Record, page —.)

Now, from the above state of facts, whose fault was it that the company was not paid its premium? Did Mr. Phinney neglect or refuse to pay his premium? Did he abandon his policy? Most certainly not. The only reason that the company failed to receive its premium was that it would not accept it, and the reason it did not accept it, as stated in its agent's letter, was the fact that he was a very bad risk. Apparently the company reasoned thus: If we accept Mr. Phinney's premium we will soon be compelled to pay his executrix the full face of the policy. We have a chance to avoid this contingency, and we will take it by refusing to accept his premium. This was done at a time when the company, as a matter of law, could not legally refuse payment of the premium under its contract. The contract was a New York contract, and governed by its laws. The legislature of New York had passed a law requiring insurance companies to give thirty days' warning before it could forfeit a contract of insurance. This statute provided the printed notice to state to the insured that if he did not pay

his premium within thirty days from mailing the notice it would forfeit its contract.

From the above evidence it is very clear, had the company at any time notified Mr. Phinney, as the statute required, "Pay your premium within thirty days from the mailing of this notice or we will forfeit your contract," Mr. Phinney would have complied with such notice; but this apparently is just what the company was anxious to avoid.

The statute is set forth in full on pages 2 and 3 of the petition for this writ.

This statute has been considered by many courts, and they have all held that the only way a policy of insurance can be forfeited is by conforming strictly to the provisions of the act. The main feature of this act is that an insurance company shall not have the power to forfeit a policy unless it mails the prescribed notice. Courts have held if the notice served is not strictly in conformity to the statute it is unavailing. In this case the company in open court *disclaimed having sent any notice.* (See Record, p. 192.) So, if the statute is applicable, there can be no question but that the company is liable.

By way of prelude to the argument, we will cite the court to the following cases where this statute was before various courts and where it was strictly enforced:

Carter *vs.* Ins. Co., 110 N. Y., 15.
Phelan *vs.* Ins. Co., 113 N. Y., 47.
Baxter *vs.* Ins. Co., 119 N. Y., 450.
De Frace *vs.* Ins. Co., 136 N. Y., 144.
McDougal *vs.* Ins. Co., 135 N. Y., 551.
Griffith *vs.* Ins. Co., 101 Cal., 627.
Warner *vs.* Ins. Co., 58 N. W., 677; S. C., 101 Mich., 157.
Griesemer *vs.* Ins. Co., 10 Wash., 202.
Hicks *vs.* Ins. Co., 9 C. C. A., 215.
Ins. Co. *vs.* Fields, 26 S. W., 280 (Tex.)
Phinney *vs.* Ins. Co., 67 Fed., 493.

So the only question of any importance on the merits is, Was this statute a part of the contract in question?

I.

This policy of insurance was a New York contract.

The contract of insurance was a New York contract, for the following reasons:

1. The parties intended New York should be the place of contract and plainly expressed their intention therein.

2. The legislature of New York intended to deprive all insurance companies chartered by it of the power to forfeit policies of insurance, except in the manner provided by statute, no matter where such contract was made. This can be demonstrated in two ways:

a. The court of appeals of New York has decided such was the meaning of the act.

b. The language of the act is subject to no other construction.

1. The application for the policy of insurance was made to the company at its home office in New York. The policy was issued in New York upon the receipt of the premium, of which it acknowledges the receipt; the premiums were all payable in New York. The proofs of death were to be delivered at the home office of the company in the city of New York. The policy when it matured was payable in the city of New York. The policy was to be forfeited, if at all, by the non-payment of a premium at the home office in New York. In other words, New York was the place of performance in every particular. If any default occurred, it occurred in New York. If the policy was ever forfeited, it was forfeited in New

York. This shows clearly that the parties intended that the laws of New York should govern as to the liabilities of the parties and be the place of contract. That this intention of the parties might be made clear, that no question might arise concerning the intention of the parties, the insurance company inserted in the printed form of the application, which is made a part of the contract, the following agreement: "This application is made to the Mutual Life Insurance Company of New York subject to the charter of the company and the laws of the State of New York." Under these circumstances, can the insurance company say that it did not intend New York to be the place of contract?

On the foregoing facts we think the law is well settled.

It has been held by this Court in numerous cases that a contract is to be construed by the laws where such contract is wholly to be performed. In a recent case Mr. Justice Harlan, speaking for this Court, used this language:

"We have seen that the bonds in suit were redeemable on the first day of January, 1866, and not before without the consent of the holder, and were payable in pounds sterling, with interest at the rate of 5 per cent. per annum from date, the interest to be paid semi-annually on named days, 'on presenting the proper coupons for the same at the house of Palmer, Mackillop, Dent & Co., London, where the principal will also be redeemed on the surrender of this certificate.' The contract, therefore, was one which in all its parts was to be performed in England. Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate of 7 per cent., fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed; for, as said by Chief Justice Marshall in Wayman *vs.* Southard, 10 Wheat., 1, on p. 48, it is a principle, universally recognized, that 'in every forum a contract is governed by the law with a view to which it was made.' And by

Lord Mansfield in Robinson *vs.* Bland, 2 Burrow, 1077, 1078, 'the parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. It is an English security, and so intended by the parties.' Referring to these and many other cases, this Court, speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard *vs.* Norton, 106 U. S., 124–136, that the law upon which the nature, interpretation, and validity of a contract depended was that which the parties, either expressly or presumptively, incorporated into it as constituting its obligations. This doctrine was reaffirmed in Liverpool, etc., Steam Co. *vs.* Phœnix Insurance Company, 129 U. S., 397, on page 458 (petitioner cites this case as against us on this point), where it was said that, according to the great preponderance, if not uniform concurrence, of authority, the general rule was that the nature of the obligation and interpretation of the contract are to be governed by the law of the place where made, unless the parties at the time of making it have some other law in view. What law did the parties here have in view as determining the legal consequences resulting from the non-performance of the contract between them? Presumptively the law of England, where the contract was entirely to be performed."

Coghlan *vs.* S. C. R. R. Co., 142 U. S., 101, 109.

The following authorities sustain the above rule of law:

Phinney *vs.* Ins. Co., 67 Fed., 493.

Pritchard *vs.* Norton, 106 U. S., 124, 136.

Liverpool Steamship Co. *vs.* Ins. Co., 129 U. S., 397, 458.

Scudder *vs.* Bank, 91 U. S., 406, 411.

Bank of U. S. *vs.* Daniel, 12 Pet., 54.

Hall *vs.* Bruen, 1 How., 169.

Duncan *vs.* U. S., 7 Pet., 435.

Cox *vs.* U. S., 6 Pet., 172.

Boyce *vs.* Edwards, 4 Pet., 111, 123.

Lamar *vs.* Macou, 114 U. S., 218.

Watts *vs.* Connors, 115 U. S., 353, 362.

Scotland Co. *vs.* Hill, 132 U. S., 107, 117.
Dickerson *vs.* Edwards, 77 N. Y., 573, 578.
Pecks *vs.* Mayo, 14 U. T., 33, 38.
Arnold *vs.* Potter, 22 Iowa, 194, 198.
Griffith *vs.* Ins. Co., 101 Cal., 627, 641.
Griesemer *vs.* Ins. Co., 10 Wash., 202, 211.
Mass. Ins. Co. *vs.* Hale, 23 N. E. (Mass.), 849.
Story on Conflict of Laws, 8th ed., par. 280, p. 376, and long list of authorities.

In another case decided recently by this Court a contract had been actually made in the District of Columbia, but it was provided in the contract that it should be subject to the laws of Connecticut, just as the stipulation provide in this contract that it should be construed by the laws of New York. Chief Justice Fuller uses this language:

"Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts, the statute of the State where they were made and to be performed explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children, but if the annual premium exceed three hundred dollars ($300) the amount of such excess shall inure to the benefit of the creditors of the person paying the premium."

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

Wash. Bank *vs.* Hume, 128 U. S., 195, 206.

The supreme court of Iowa in a case decided but a few months ago, when this question was before it, used the following language:

"As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such

law as that above set forth in either of these States. The policy was signed by the president and secretary of the company in the city of New York. The premium was made payable there, and the amount of the policy was to be paid, in the event of the death of the assured, at the city of New York. It was also expressly agreed that the policy should be construed to have been made in the State of New York. It was therefore a New York contract, and is to be governed by the laws of that State. (Richards, Ins., 44.)"

Goodwin vs. Ins. Co. (Iowa), 66 N. W., 157, on p. 160.

The circuit court of appeals for the sixth circuit, in a very recent case, in an opinion by Judge Taft, says:

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that 'the place of contract shall be the city of Philadelphia, State of Pennsylvania.' In Weyman *vs.* Southard, 10 Wheat., 1–48, Chief Justice Marshall stated it to be a principle of universal law that 'in every form a contract is governed by the law with a view to which it is made."

Penn. Ins. Co. *vs.* Savings Bank, 72 Fed., 413, on p. 418.

It is claimed that this Court, in the case of The Equitable Insurance *vs.* Clement, 140 U. S., has in reality reversed the above decisions, and held that a contract is to be construed by the laws where the contract is made, not where to be performed, even though in the case of Coghlan *vs.* R. R. Co., 142 U. S., quoted *supra*, this Court held directly with us, and they do attempt to distinguish between the Coghlan case and this, nor could they if they attempted to do so. It is very apparent that the Clement case can be distinguished from the cases already cited.

In the Clement case the insurance company accepted the privilege afforded it by the State of Missouri to do business in that State. By the law of Missouri an insurance company insuring a citizen of that State within its borders

could not forfeit but a portion the reserve on a policy after it had been in force two years.

The insurance company undertook to avoid this statute in two ways: First, by an express waiver of the statute by a clause in the policy. This Court held such clause void. In the second place, it made the place of the performance of the contract in New York, and claimed it had thus avoided this statute. This Court held against that contention. In other words, this Court held that the company could not, directly or indirectly, avoid the public policy of Missouri as established by statutes of that State. This Court, in another case already cited, recognized this exception. As already stated, parties in the District of Columbia entered into a contract of insurance with a Connecticut company. Though the contract was actually made in the District of Columbia, yet the place of the performance of the contract was Connecticut; hence a Connecticut contract. In that case this Court used this language:

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of the contract as if incorporated therein, not only because they are taken as if entered into there, but because there is the place of performance, and the stipulation of the parties was made with reference to the laws of that place; 'and if it is so as between Hume and the Connecticut companies, then he could not at any time dispose of these policies without the consent of the beneficiary. *Nor is there anything to the contrary in the statutes or general public policy of the District of Columbia.*'"

Washington Bank vs. Hume, 128 U. S., 195, on p. 207.

In other words, if there had been a statute or public policy of the District of Columbia which the company was attempting to evade by making the place of contract Hartford, Connecticut, such provision of the contract would have been null and void. This makes the decision of the Supreme Court in 140 U. S. and 128 U. S. and other cases cited harmonize.

2. THIS LAW REQUIRING SERVICE OF NOTICE IS IN EFFECT AN AMENDMENT OF THE CHARTER OF INSURANCE COMPANIES CHARTERED BY NEW YORK AND CONTROLS THE MANNER OF FORFEITING A CONTRACT BY SUCH COMPANIES, NO MATTER WHERE THE CONTRACT IS MADE. THE COURT OF APPEALS OF NEW YORK HAS SO HELD.

It is not claimed, and could not be successfully, that the legislature could not compel companies chartered by it to serve notice on all policy-holders, regardless of where the contract was made; but it is claimed that such was not the meaning of the act. The one complete answer is that the court of appeals of New York has held that such was the meaning of the act.

One Carter was a resident and citizen of the State of Georgia. In 1870 the Brooklyn Insurance Company of New York issued a policy of insurance on his life. Where this contract of insurance was consummated is not shown in the opinion or statement of the case. This was six years before the enactment of the law requiring notices. In 1877, 1878, 1879, and 1880 Mr. Carter paid his renewal premiums in Georgia, so, according to the plaintiff in error's contention, the contract of renewal was made in Georgia. It would not be a renewal within the meaning of the following opinion until it was paid at Georgia or place where the premium was actually paid. The appellate court of New York was compelled to pass upon the question whether or not the payment of a renewal premium was a renewal of the contract within the meaning of the statute, and the opinion on this point is as follows:

"Upon this state of facts several questions arose upon the trial, among which the material ones are:

"First. Whether the law of 1876 requiring notices to be sent to the policy-holders applies to this policy." * * *

"We are, therefore, of the opinion that the plaintiff's policy was renewed within the meaning of the act. We are also of the opinion that no such notice was given to him as the

statute reqired. The law reads that the notice should be sent to the assured at his known place of address, and there is no claim but that the defendant knew his place of address at all times subsequent to the year 1880."

Carter vs. Life Ins. Co., 110 N. Y., 15 on p. 20.

See also Baxter *vs.* Ins. Co., 119 N. Y., 450, 454.

We earnestly ask the Court's attention to the whole of the above opinion. The legislature had the power to compel insurance companies to serve notice of maturity of premiums on all policy-holders. The highest court of New York has held that such was the meaning of this act. Then no other court will pretend to give the act any other meaning or construction. But this authority is not alone. The supreme court of California in a case subsequent in time followed the above decisions. The insurance company claimed the contract was a California contract, but the supreme court held that the statute was a limitation on the power of the corporation, and therefore was applicable. The court says:

"*It would seem, however, that the New York statute was intended to cut deeper*, and as a matter of public policy to inhibit forfeitures by life insurance companies except by the method therein provided.

"No life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of premium, etc., except as therein provided.

"The statute is a limitation on the power of the company to do a specified thing except under prescribed conditions. That which a corporation has not the power to do, if attempted to be done by it, is *ultra vires* and void. * * *

"A corporation, being the creature of the law, must confine its functions to the limits prescribed for its action, and if the law expressly inhibits it from doing a given thing it is powerless to do that thing, and if it can do it only in a given manner the prescribed method becomes the measure of its power."

Griffith *vs.* Ins. Co., 101 Cal., 627.

The civil court of appeals of Texas, construing this same statute, follows the above cases and states the rule unequivocally:

"The laws of New York would apply to contracts of insurance made by insurance companies chartered under its laws, whether the contracts were made in New York or any other States in the Union."

Manhattan Ins. Co. *vs.* Fields, 26 S. W. (Tex.), 280, 282.

The above cites as authority on this point Rue *vs.* Railway Co., 74 Tex., 553.

Each of the following authorities recognizes the rule we are contending for and enforces it:

Hebb *vs.* Ins. Co., 138 Pa. St., 174, 180.

Ins. Co. *vs.* Ficklin, 74 Md., 172, 180.

Relfe *vs.* Rundle, 103 U. S., 222, 226.

Canada So. R. R. Co. *vs.* Gebhart, 109 U. S., 527, 537.

II.

THIS STATUTE CANNOT BE WAIVED, BUT ITS TERMS MUST BE COMPLIED WITH.

There have been many attempts made by insurance companies to avoid this and kindred statutes. Sometimes it has been attempted by inserting in the policy, as in this, an express waiver of the statute. In other cases the attempt has been to make the place of contract outside of the State. The courts have uniformly held against such stipulation or device. In California, in a case already alluded to, the company (a New York company) tried both, but the court, in an opinion already cited, says:

"Admit that Griffith attempted to waive all notice of nonpayment of premiums, if the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a

waiver involves the right of the contracting parties to make and accept such waiver. Consent never gives jurisdiction not otherwise possessed of the subject-matter to a court, for the reason that it lacks the power to adjudicate such subject-matter, except as conferred by law. * * *

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that, being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away."

"The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Griffith vs. New York Life Ins. Co., 101 Cal., 627, on pp. 641-'2.

This Court reached the same conclusion in another case, using this language:

The Court says:

"It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not, is an ineffectual attempt to evade and nullify the clear words of the statute."

Insurance Co. vs. Clemens, 140 U. S., 226 ,on p. 234.

Mr. Justice Brewer, of this Court, when sitting as circuit judge, expressed this proposition in very forcible language:

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or

changed, a child can see it would protect only so far as the insurance companies were willing."

Wall *vs.* Ins. Co., 32 Fed., 273, 277.

To the same effect are each of the following cases:

Fidelity Ins. Co. *vs.* Ficklin., 74 Myd, 172, 185–'6.
Hermany *vs.* Ins. Co., 151 Penna., 17, 24.
Reilly *vs.* Ins. Co., 43 Wis., 449.
Chamberlain *vs.* Ins. Co., 55 N. H., 249.
Emery *vs.* Ins. Co., 52 Me., 322.
White *vs.* Ins. Co., 4 Dill., 177.

III.

THE SECOND PREMIUM WAS TENDERED BY MR. PHINNEY PRIOR TO HIS DEATH.

We have already shown that the agent wrote the company the time the second premium was due that Mr. Phinney had "offered to pay his premium" (Record, p. 187). Immediately following this the company instructed the agents not to accept his premium if tendered. Again the agent wrote the company:

"DEAR SIR: Your wire of the 9th inst. reading, 'If tendered decline acceptance September premium No. 422,198, Phinney,' duly received.

"*This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.*

"Yours very truly, F. L. STINSON."

In plain English this meant he was a dying man and the company wanted to terminate the policy. Having made one tender, no other or subsequent tender was necessary. The company had elected to take that position, and it cannot retreat from it.

IV.

UNDER THIS STATUTE OF NEW YORK THE TENDER OF A PREMIUM IS NOT NECESSARY UNTIL THE STATUTORY NOTICE IS SERVED.

The question of the tender of a premium upon a contract of insurance under this statute was before the appellate court in New York, and it was there held that it was not a necessary preliminary prior to commencing the action. This was the only question before the court in that case. We can do no better than to quote a part of the opinion in that case:

"*It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the twenty-fourth of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured or her assignee, except to present to the defendant the proofs of death required by the policy.* The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the person entitled to the benefits of the policy had only to establish the facts of death within the time and in the manner prescribed therein. The contract was kept in life by force of the statute, until the contingency upon which payment depended occurred."

Baxter *vs.* Ins. Co., 119 N. Y., 450, 456–'7.

This decision is followed by another decision in the same court, in part as follows:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the de-

fendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frece vs. Insurance Co., 136 N. Y., 144, on p. 151.

The supreme court of Washington, where this case arose, said it was incumbent upon it to follow the above decision, being the construction of a statute of New York by the highest court of New York.

Griesemer *vs.* Ins. Co., 10 Wash., 202, 211.

V.

NO TENDER OF PREMIUM WAS NECESSARY, BECAUSE THE COMPANY HAD DENIED LIABILITY ON THE CONTRACT.

As we have already shown, the petitioner had refused the tender of the premium by Mr. Phinney during his lifetime. When defendant in error offered proofs of death of Mr. Phinney, the company denied all liability on the contract. The company, having taken that attitude, cannot be heard to say that we ought to have tendered a payment on a contract which it was repudiating. Does the company mean to say that it was not acting in good faith, and that it would have taken the premium? It is an old maxim of the law that no court will compel a party to do an utterly useless act.

The supreme court of Washington, in a case exactly identical with this, cited *supra*, Griesemer *vs.* The Mutual Life Insurance Company of New York (this same plaintiff in error), has held the foregoing to be the law. The opinion is by Mr. Justice Hoyt, as follows:

"The appellant alleges one other reason for the reversal of the judgment, which it is necessary for us to consider. It was not made to appear from the record that there had ever

been any tender of the premium which became due before the death of the assured; and it is contended that, since the payment of the premium was a condition precedent to the policy being kept in force, no action could be maintained thereon until such condition had been complied with by some one claiming under the policy. This contention is founded upon the well-settled legal proposition that an action cannot be maintained upon a contract by one party unless he has complied or offered to comply with all the conditions on his part to be performed. There is, however, a well-settled exception to this rule when it relates to the question of tender of money, and that is that whenever it clearly appears that the tender, if made, would not have been accepted, the contract may be enforced without such tender; and, in our opinion, the question of tender in the case at bar was within this exception. It appears from the notice sent by the company upon the receipt of proofs of death that the company entered upon the investigation of the rights of the claimant under the policy, and held that they were terminated by the non-payment of the premium; and we think that enough appears to show that the company elected to stand upon the forfeiture growing out of such non-payment, and would have refused any tender of such premium."

Griesemer vs. Mutual Life Insurance Co., 10 Wash., 202, on p. 210.

Griesemer, admx., vs. Mutual Life Insurance Co., 10 Wash., 211.

It is thus seen that the highest court, both of Washington and New York, has held that a tender of premium was entirely unnecessary. Defendant in error, living in the State of Washington, had a right to rely on these authorities as establishing the law of the case, and upon which she could rest with absolute confidence, one bing the law of the place of contract, the other the law of the forum. This plaintiff in error was familiar with these decisions when she commenced this action. No court will tell her she was in error in relying upon them confidently as settling the question. Would it not be doing her a great wrong and injustice to dismiss her action and compel her to tender a premium on

a contract that the company has repudiated, and that, too, contrary to the laws of the place of contract and the forum as well. Further than this, the decisions of both States are in entire harmony with numerous other courts, among them the following: United States *vs.* Peck, 102 U. S., 64; Lawrence *vs.* Miller, 86 N. Y., 131, on pp. 136–'7; Equitable Insurance Co. *vs.* Vining, 7 C. C. A., 359; Insurance Co. *vs.* Smith, 5 N. E., 417 (Ohio State).

DEFENDANT IN ERROR DID PROVE HER ACTION AS ALLEGED.

Defendant in error alleged that the insured duly performed all the conditions of the contract by him to be performed.

This she proved. The payment of the first year's premium was admitted by defendant in error. No second premium was due and payable until the statutory notice was served. It was not necessary to prove the payment of any other premium until the defendant had proved that it had served the statutory notice, which it failed to do. In our pleading we follow the cases of Baxter *vs.* Insurance Co., 119 N. Y., 450; De Frace *vs.* Insurance Co., 136 N. Y., 144, and the cases of Griesemer *vs.* Insurance Co., 10 Wash., 202, also 212, cited above, and for the reasons therein stated we were safe in doing so.

VI.

THIS STATUTE IS NOT A PENAL ONE.

It is unnecessary to argue this proposition. There is nothing about the statute that can be called penal in any sense of the word. It simply provides that a penalty of forfeiture of a contract shall not occur without timely warning and notice, and preserves the contracts of the parties intact until such notice is served.

VII.

MEANING OF THE STATUTE.

Petitioner goes into a discussion of the meaning of the statute. We think it means just what it says. No court has had any trouble about finding out its true meaning. It says no policy of insurance shall be forfeited until a prescribed notice shall be served at least thirty days before a forfeiture can be declared.

The appellate court of New York and many other courts have held that that is just what it means, and that a policy of insurance is a binding contract until it is terminated by the notice. This petitioner ignored the statute altogether. It took the position it did not need to comply with law. (See Record, p. 192.)

Petitioner quotes from a decision of this Court to the effect that an insurance company must have the power to cut off unprofitable members. It has it under this statute. It can serve the statutory notice any day after the due date of a premium, and thus forfeit the contract.

The contention of petitioner that this statute was only intended to preserve the reserve to a policy-holder shows to what straits they are driven to find something to base an error on.

One complete answer to this is, the statute does not read that way. Another complete answer is that the legislature of New York has enacted another law for the express purpose of preserving the reserve on each policy to the policy-holder. It provides when and how the policy-holder shall have this reserve, what share shall be forfeited to the insurance company, and what share shall be preserved to the policy-holder.

It has passed another law requiring assessment companies and mutual benefit associations to serve certain

notices, similar to the notice provided by this statute, on their policy-holders. In such societies there is no reserve. How are those societies to dodge that statute? This argument of petitioner will be unavailing. All courts that have enforced this statute before them have enforced it strictly, believing it to be a good law for the protection of the insured.

Conclusion.

In our brief we have shown at least three reasons why the application for a writ should be denied:

1. In the first place, the dismissal of the writ of error raises no question of grave public importance or one in which there is a conflict in the decisions of the various courts.

2. In the second place, the circuit court of appeals correctly decided that the writ should be dismissed. If no error is to be corrected no writ should issue.

3. In the third place, even though this Court should be of the opinion that the dismissal of the writ raised a question of sufficient importance to give this Court the right to issue the writ, and even though this Court further was of the opinion that the lower court committed error in dismissing the writ, yet from the discussion of the merits, which petitioner invited, the court will find that the judgment of the circuit court was right and must be affirmed if ever heard on its merits. Then what good may come from prolonging the case? Would it not be doing respondent a great wrong and injustice, and petitioner as well, to put her to the great cost of maintaining this struggle for months, and, possibly, two or three years, when no other result can be reached? This, too, when she has already been to the expense of litigating this case to the Court of last resort as

determined by the act establishing the circuit court of appeals. It may be that petitioner, with its millions of assets, can easily afford to litigate the matter further, as litigation is an important part of its business; but not so with this respondent, a widow left with an involved estate on her hands to struggle through it all as best she may.

In addition to all this, the equities of the case are with us. The insured paid his first premium and tendered the second, which the company refused to take, because it had its finger upon insured's pulse, and it was beating slow and weak.

This premium, with interest, was deducted from the amount defendant in error would otherwise have recovered.

The petitioner was trying to forfeit his contract to escape the payments of its loss. The agent said, in a letter written at the time he refused to take his premium: "He is now a very bad risk." The inspector, writing at about the same time, reports: "He is growing fat and flabby; is drinking not enough to get drunk, but enough to ruin his health." Without right, contrary to the law of New York, it declared his policy forfeited. What does the company mean when it says he did not tender his premium? Did it think respondent would neglect to call the court's attention to the record? Why should it complain about not receiving a premium it refused to take; about failing to receive a premium that it telegraphed its agent across the continent not to take under any circumstances? And the agent triumphantly answers he has already refused to take it.

The company was much alarmed lest the agent would overlook the fact that Mr. Phinney was a bad risk, and might give a few hours grace to save the forfeiture of his policy of insurance, which Mr. Phinney prized highly. His application for more insurance had just been denied on account of his condition, and he was very anxious to keep this policy in force. "Forfeitures are odious; they are often the

means of great injustice and oppression," and courts will only enforce them when necessary.

It would have been a rank injustice had the company accomplished its object in forfeiting this contract; but in its zeal and hurry to forfeit the contract it overstepped itself and failed to comply with the New York statute, which was intended to accomplish this very object—prevent a forfeiture without timely notice and warning.

For these reasons we submit that the application should be denied.

Respectfully submitted.

S. WARBURTON,
Attorney for Respondent and Defendant in Error

A. T. BURLEIGH,
Of Counsel.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE MUTUAL LIFE INSURANCE COMPANY of New York,
Plaintiff in Error.,
vs.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, deceased.

No. 274.

Brief of Defendant in Error, on Motion to Quash and Dismiss Writ of Error.

LORENZO S. B. SAWYER,
Counsel for the Defendant in Error for the purposes of the motions.

S. WARBURTON AND A. F. BURLEIGH,
Of Counsel for Defendant in Error.

Houghton Printing Co.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE MUTUAL LIFE INSURANCE COMPANY of New York,
Plaintiff in Error.,
vs.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, deceased.

No. 274.

To Edward Lyman Short, Strudwick & Peters, Stratton, Lewis & Gilman, Esquires,
Counsel for Plaintiff in Error.

PLEASE TAKE NOTICE, that on Monday the 4th day of May, 1896, at the opening of the court, or as soon thereafter as counsel can be heard, at the court room of said court, in the City and County of San Francisco, State of California, the motions of which the foregoing are copies will be argued and submitted to the United States Circuit Court of Appeals for the Ninth Circuit, for the decision of the said court thereon.

LORENZO S. B. SAWYER,
Counsel for the Defendant in Error for the purposes of the motions.

S. WARBURTON AND A. F. BURLEIGH,
Counsel for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE MUTUAL LIFE INSURANCE COMPANY of New York,
Plaintiff in Error.,
vs.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, deceased.

No. 274.

Comes now the defendant in error, by her counsel appearing in that behalf, and moves the court to dismiss or quash the writ of error in the above entitled cause for manifest manifold irregularities and informalities in the papers and proceedings in error, viz, because:—

1. There is no technical nor proper return to said writ of error.

2. Neither the petition for writ of error, nor the assignment of errors, nor the order granting writ of error and fixing amount of bond, nor the bond upon said writ of error, nor the citation upon said writ of error, was filed with the clerk of the court below.

And the said defendant in error by counsel as aforesaid, also moves the court to dismiss or quash the writ of error in

the above entitled cause for want of jurisdiction, because:—

1. No proper or legal citation on said writ of error was issued or served; and

2. Said writ of error was not filed in the court below.

This motion will be made upon the record herein.

LORENZO S. B. SAWYER,
Counsel for Defendant in Error for the purposes of these motions.

S. WARBURTON and A. F. BURLEIGH,
Counsel for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE MUTUAL LIFE INSURANCE COMPANY of New York,
Plaintiff in Error.,
vs.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, deceased.

No. 274.

BRIEF OF ARGUMENT ON MOTION TO DISMISS OR QUASH WRIT OF ERROR.

1. *No technical return to writ of error.*

It is manifest from a mere inspection of the original writ of error which accompanies the transcript of the record herein that there is no formal nor legal return to the writ. Every writ of whatsoever kind, ought when returned, to have endorsed upon it a return: that is, a short account in writing of the manner in which it has been executed. Stephen on Pleading, star page 21. It is not enough that a writ is executed, or even that a party is served with a summons or subpœna; the endorsement upon the return writ should show what has been done, or left undone, in the premises. So in this case, the tsanscript certified by the clerk of the lower court is only the clerk's return to the said writ under the rules in that regard, and not

the return of the judges of the court to whom the writ of error was directed (see writ), and there should, besides, have been some such endorsement as this upon this writ:

"The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit in and for the District of Washington:

"The record and all proceedings of the complaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the Court: .....

(SEAL.) Clerk."

And this endorsement, like the certificate at the end of the transcript, should have been authenticated by the signature of the clerk and the seal of the lower court. Even a commission to take testimony, or dedimus, besides being returned with the testimony properly certified by the person to whom it is directed, should have endorsed upon it some such return as the following:

"In pursuance of the command of the within commission, I (or we) have executed the same, as will appear by the schedule of testimony, hereto attached and returned herewith.

.....

Commissioner."

Which return should be signed by the commissioner.

We cite no authorities to this point because the immemorial, universal and unexceptionable rules and practice of all courts with regard to all writs seem a sufficient support. It needs no other.

This writ is not a creature of our statute, but an old, old mother (and mother-in-law) country writ, and when we adopted it in 1789, we adopted the practice concerning it, except in so far as the same has been modified by United States statutes or the rules of the United States Courts. These being silent upon the subject of this technical and formal return, the old practice, of course, obtains.

"All provisions of law should be construed with reference to the hitherto existing law and practice in such cases. There can be no presumption that Congress intended to change the practice, unless that intention is plainly manifested by the language of the act." Stevens vs. Clark, 62 Fed., 321, *322*. This court might, perhaps, under the second section of the act of its foundation, have prescribed "the form of writs and other process and procedure;" but, instead of doing so, it has adopted the practice of the Supreme Court of the United States "as far as the same shall be applicable" (C. C. A. Rule 8), and the very act establishing this court has extended over it and over appeals to and writs of error from it, "all provisions of law now in force regulating the methods and system of review through appeals or writs of error" (Act March 3, 1891, Sec. 11).

The form of the writ of error was in 1792 devised by the justices of the Supreme Court of the United States and by the clerk of the said Supreme Court transmitted to the clerks of the United States Circuit Courts, and under that act of 1792 (R. S. Sec. 1004), it may issue either from the appellate court, or from the office of the clerk of the court where the record remains which rendered the judgment. The writ of error is the writ of the appellate court although issued by the clerk of the lower court (Mussina vs Cavazos, 6 Wall., 355), and a clerk of the lower court has no right to change its form without consent of the Supreme Court justices. Barton vs. Forsyth, 5 Wall., 590.

It is almost as impossible to conceive of a writ returned without a formal return, as it is to conceive of a court, without the necessary formalities of a court. No authority that we can find does away with the necessity of this formal return. In the case of Blitz vs. Brown, 7 Wall., 693, the writ of error was dismissed because the certificate of authentification of the transcript was without the seal of the court below or the signature of the clerk, both being held to be requisite and necessary. The celebrated cases of Martin vs. Hunter, 1 Wheat., 304, *361*, and Worcester vs. Georgia, 6 Pet., 515, *536*, *537*, *565*, *566*, hold, among other things, that under the rule concerning "writ of error, return and record," it is not necessary that the record should be certified by the *judge* who held the court. That the signature of the clerk and the seal of the lower court were sufficient: the latter case citing the case of Stewart vs. Ingle, 9 Wheat., 526, wherein it was held that a return made by the clerk of the court to which it was addressed was a sufficient return to a writ of certiorari, a writ very like the writ of error. A writ of error partakes of the nature of a writ of certiorari which removes a record from an inferior to a superior court, and that of a commission to the judges of such superior court to examine the record and affirm or reverse the judgment therein according to law. Co. Lit. 288 b. and 2 Bac. Abr. 187 It is, of course, natural and proper that when a writ is directed to a court or to the judges thereof, and concerns a record of that court, the ministerial officer of that court who has the custody of the records of that court should make and sign whatever is necessary in the way of return to the writ. But why should not the clerk, besides signing and sealing a certificate to the transcript, also sign and seal a brief account of what he has done in the premises by way of endorsement upon the writ? The properly authenticated transcript is the substance of the return to a writ of error or certiorari, just as the money

made upon an execution is the substance of a return to the writ of execution; but neither the clerk nor marshal (or sheriff) is thereby relieved from the duty of endorsing upon the writ executed a brief account of the manner in which he executed it.

If it be said that this practice has not always prevailed; that this technical and formal return is sometimes omitted; we ask is it not high time, then, to return to and insist upon the proper and better practice. In the case of Villabolos vs. United States, 6 How. 81, *89*, Chief Justice Taney held that a citation signed by the clerk instead of the judge of the lower court could not bring a party into the Supreme Court or give it jurisdiction; although he found upon examination of the Supreme Court records that in all of the former cases from the same state from which the case in hand came, the citation was signed by the clerk. And says the court, "If there are any cases like the present in which this court has treated the appeal as valid, they must have passed *sub silentio* and without having attracted in this respect, the attention of the court." So counsel might find among the records of this court, several cases from the State of Washington, and perhaps from other states, in which this technical return has been omitted, which yet would not justify the omission. And so too in the case of Worcester vs. Georgia, *supra*, 565-6, the Supreme court after an examination of the records to ascertain the practice with regard to the authentification of transcripts on error, found fifteen cases wherein the records were certified by the court or the presiding judge; and yet held that it was the *better practice* for the clerk, instead of the judge, to certify the transcript, and that the clerk's certificate was sufficient.

When even so important a question as the jurisdiction of the court, as in Wales vs. Whitney, 114, U. S, 564-5, does not

appear to have been contested, the Supreme Court does not consider itself bound by the views expressed. Cross vs. Burke, 146 U. S., 82. Although it is an appellate court's first duty to determine the question of its own jurisdiction and then the jurisdiction of the court below, no court goes out of its way to determine questions not raised.

This point, as well as some others that we make upon this motion, may to some seem small ; but law, like life, is made up of small things, and neither good form nor small things are to be despised. Some of our points are jurisdictional, and surely nothing jurisdictional can be called trivial. 'It is dangerous to alter old established forms." This doctrine is so sound and important that it has been crystalized into the well known maxim *via antiqua via est tuta* Form is frequently so closely allied to substance, that it cannot be separated from it. For instance, Chief Justice Marshall in the case of Cohens vs. Virginia, 6 Wheat. 264, *411*, says, "An appeal might be given and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form not substance." Yet the Supreme Court itself says in the case of Murdock vs. City of Memphis, 20 Wall, 590-642, "We dismiss every day cases brought here by writ of error to a circuit court because they can only be brought here by appeal," citing the San Pedro, 2 Wheat. 132 ; McCollum vs. Eager, 2 How., 61 ; and Miner vs. Tillotson Id. 392, "The question may perhaps seem to be rather one of form than of substance, but nevertheless it is our duty to conform to the acts of congress, and we cannot exercise the appellate jursdiction conferred upon this court, except in the form prescribed by law." Parrish vs. Ellis, 16 Pet. 451. And again (about the briefest decision of the Supreme Court found in the reports), "This action was dismissed because brought here by appeal instead of writ of error." Bevins vs. Ramsey, 11 How., 185. So it seems that although the mode of remo-

val is form not substance, the adoption *of any mode but the right one* will surely bring about a summary dismissal of the case. This is only one instance out of many which shows that mere form and not substance will serve to make or mar the fortunes of a case. As manners make the man, so form frequently makes the substance, or, at least, the substance cannot get along without its appropriate form. You may have ever so good a case, one in which justice and equity join hands, but if your pleadings, process and proceedings are not correct in form as well as in substance, you will certainly lose your case.

II.

NEITHER THE PETITION FOR THE WRIT OF ERROR, NOR THE ASSIGNMENT OF ERRORS, NOR THE ORDER GRANTING THE WRIT OF ERROR, NOR THE BOND UPON SAID WRIT OF ERROR, NOR THE CITATION THEREON WAS FILED WITH THE CLERK OF THE COURT BELOW.

Under this second head of our motion to dismiss or quash this writ of error for manifest irregularities and informalities, we have, in the interest of brevity, joined several grounds, *upon every one of which grounds, courts have dismissed such writs.* As to the necessity of filing the petition for the writ of error and the assignment of errors, the rule of this court is explicit.

"Rule 11. The plaintiff in error, or appellant, *shall file with the clerk of the court below*, with his petition for the writ of error or appeal, an assignment of errors, etc.," and a little further on, "No writ of error or appeal shall be allowed until *such assignment of error shall have been filed.*" The Supreme Court of the United States has a similar rule which would govern this court under the 8th rule of this court, if this court had not a rule of its own. This court has, under the second section of the act creating it, already alluded to, "the power to

establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law ;" and its rules within and, in pursuance of the law have the force and effect of law. "A rule established by the Supreme Court of the United States, in pursuance of law, becomes, to all intents and purposes, of the same effect as the law itself * * * and substantially a law of the United States." Seymour vs. Phillips & Colby Co., 7 Bissell, 460 465. And what is true of the Supreme Court's rules, is also, under this second section of the law, true of this court's rules. If this court had no rule on this subject the eleventh section of the act would cover the ground and enforce the same laws and practice which this court has in and by its eighth rule adopted.

It is not denied that a court can alter or suspend its *own* rules when justice demands it, but rules were certainly made to expediate business. Says Mr. Justice Blatchford in Richardson vs. Green, 130 U. S., 104 (9 S. C. R. 443, *445*,) "All suitors in this court are bound by its written rules, and its practice and decisions are established and known." "Rules were made to be enforced and observed." Van Gunden vs. Va. C. & I. Co., 52 Fed. (C. C. A.) 838, *841*, citing Deitsch vs. Wiggins, 15 Wall, 539; R. Co. vs. Mulligan, 67 Fed. (C. C. A.) 569; Vider vs. O'Brien, 62 Fed. 326; Sutherland vs Brace, 71 Fed. (C. C. A) 469, *472* In the last case, says the court, "If the practice thereby (Rule 11, C. C. A.) be deemed onerous and the rule declared, ought to be rescinded, it can more certainly be done by strict adherence to the decision (R. Co. vs. Mulligan, *supra*) than by ignoring it." In Deitsch vs. Wiggins, *supra*, Mr. Justice Strong said, "Most of the assignments of error have been made in total disregard of the twenty-first rule of this court. That rule is necessary to the disposition of the business which presses upon us and it is our intention hereafter to enforce strict compliance with its demands,

etc." Says the court in Warner vs. T. & P. Ry. Co., 54 Fed. (C. C. A.) 920, *922*, "It is well to proceed in order; and in a matter of general usage so long established parties could not complain if some strictness should be exercised in enforcing compliance with prescribed forms." In the Mutual Life Insurance Company vs. Conoley, 63 Fed. (C. C. A.) 180, *1* and *2*, the court below allowed an appeal although the case was a law case, and in order allowing it granted the defendant below thirty days in which to file assignments of error which were filed within the time granted; but the Circuit Court of Appeals says, "It is plain that this court cannot consider the errors so assigned if it regards and is governed by its rule as cited (Rule 11, C. C. A.) We have had occasion several times heretofore to request attention to the rules applicable to the questions now under consideration, and to the necessity for a strict adherence to the mode of procedure designated by them. We now do so once more indulging the hope that no occasion will arise in the future requiring us to refer to them again in this connection. (citing) Van Gunden vs. Iron Co., *supra*, Improvement Co. vs. Frari, 58 Fed. (C. C. A.) 171. * * * We feel compelled to enforce the provisions of the rules and the requirements of the practice alluded to, and to again announce that *this court*, in order to secure uniformity in the proceedings of the circuit and district courts, as well as in its own, will hereafter *insist* upon a strict compliance with the same ; and we do this in the present case the more readily for the reason that its record shows that no substantial error was committed by the court below, and that consequently no injustice will in fact be done to the parties thereby, while much good may result therefrom we hope." In the State of Florida vs. C. H. Phos. Co., 70 Fed. (C. C. A.) 883, *886*, the court says, "The rules of the court although directory, were made to be observed and our patience is tried with application for relief where counsel have

utterly ignored and disregarded their plain requirements. An observance of the rules preserves the rights of the parties and facilitates the business of the courts. Disregard of them not only injuriously affects the rights of the parties but delays and embarrasses the court to the hindrance of other causes."

The case of Jones vs. Mann, 72 Fed., 85, only holds that the appellant while complying with rule 11 of the Circuit Court of Appeals had put it out of his power to comply with rules 23 and 24 of said court, and therefore could not be punished for non-compliance with the later rules. That is all there is to that case.

But if authorities, in addition to rules and practice, were needed, there are plenty of them. The Circuit Court of Appeals in United States vs. Goodrich, 54 Fed., (C. C. A.) 21, the first case which arose under the eleventh rule of the Circuit Court of Appeals, announced that it would enforce this rule to the letter and concludes, "The result is that this court will not consider errors, the assignment of which is not made and *filed in the court below*, when the appeal or writ of error is allowed. The writ of error is accordingly dismissed." Being the first case of the kind in this court the court did examine the record in the case and found no substantial error in it. If this court should deem it necessary to examine this record of ours, it would find no error in it. The case of the U. P. R. R. Co. vs. the C. E. R. Co., Id. 22, is of the same tenor and effect and concludes "The judgmect below is affirmed." A failure to file an assignment of errors in the court below is a good ground for dismissal. Durfour vs. Lang, 54 Fed. (C. C. A.) 913. As to the necessity of filing the order allowing writ, the bond upon writ and the citation thereon, although the law and the rules are silent, the books are full of precepts for it and cases recognizing it. See all works on practice in United States Courts including Mr. Jus-

tice Curtis' Practical Directions for suing out and prosecuting writs of error and appeals to the Supreme Court of the United States. Is it not a universal rule of every court, that every paper belonging to any case in that court should be filed in that case and court? There needs no rule to require the filing of such papers. It is the unwritten rule or law of every court, a corollary of that great law for the conduct of life as well as for the obtaining of suits. "*Let all things be done decently and in order.*" "As in this case the petition, order and bond were not filed in the Circuit Court, etc., (until too late), the cross-appeal must be dismissed." Churchill vs. Farrar, 135 U. S. 609 (10 S. C. R. 771, 772). "*An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought,' until it is in some way presented to the court which made the decree appealed* from thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done BY FILING THE PAPERS, viz: the petition and allowance of appeal (where there is such a petition and allowance), the appeal bond and the citation." *Nor can these papers be filed nunc pro tunc. No order nunc pro tunc is allowable in such a case.* "If it could be, the law which limits the time within which an appeal can be taken" (or writ of error sued out) "would be a dead letter." Credit Co. vs. Ry. Co., 128 U. S. 258 (9 S. C. R. 107). "The petition and bond have not been filed or presented even at this late day." Threadgill vs. Platt, 71 Fed. 1.

But it may be urged that admitting the necessity of the filing of these documents, it does not follow that they were not filed merely because they were not endorsed "filed" by the clerk of the court below.

What constitutes filing a paper? Burrill's Law Dictionary thus defines it:

"*Delivering the paper (endorsed with the title of the cause and attorney's name) to the clerk of the court in which the action is pending, who marks it* 'FILED,' *adding the date, and deposits it, under the proper head among the papers, or files, in his office.*"

This is substantially the definition of filing found in all the law and other dictionaries. Some of them like Burrill's, Black's, Webster's International, and the Standard Dictionary, give a double definition. "*To 'file' a paper on the part of a party, is to place it in the official custody of the clerk. To 'file' on the part of the clerk is to endorse upon the paper the date of its reception, and retain it in his office subject to inspection by whomsoever it may concern.*' We, of course, maintain that THE ACT OF FILING HATH THESE TWO BRANCHES AND THAT THE FULL AND PROPER DEFINITION OF FILING EMBRACES THEM BOTH. If authority is needed we have it. Foster in his work on federal practice, says: "*No paper is considered filed unless it has the proper endorsement by the clerk.*" 1 Foster, Fed. Prac. 598.

"*No paper is filed unless it has the proper endorsement of the clerk, merely placing it in the court papers is no filing.* A promissory note or bond upon which suit is brought, though introduced in evidence, is not filed and can be withdrawn. 'Tis not considered '*received and filed*,' nor is it entered in the court calendar." Amy vs. Shelby Co., 1 Flippin, 104 (C. C. 6 C. Aug. 7, 1872.)

"In regard to filing the orders to pay to which the signature of the judge is attached, SUCH PAPERS BELONG TO THE FILES OF THE COURT AND SHOULD BE MARKED 'FILED' BY THE CLERK FOR IDENTIFICATION." Erwin vs. U. S., 37 Fed. 470, *484*.

Almost every case concerning clerk's fees in United

States Courts involves this question and necessitates this interpretation of the definition of the word "filing."

'Tis matter of common knowledge that rules and regulations of the Department of Justice requiring certain papers, reports and vouchers, to be filed, require them to be marked or endorsed *filed*. If every paper or thing, left in the custody of the clerk, or in the clerk's office, were considered filed whether marked "filed," or entered in the register as "filed," or not; the clerk's responsibilities would be very much enlarged, and persons would be afraid to leave anything at the clerk's office. The bare statement of "such a state of things" shows its absurdity. A clerk frequently receives a paper or document and keeps it to be filed when his fees are paid, and it is generally considered that he has a perfect right to do this.

Even if "depositing in the proper office" were "filing" in English practice, our law and practice have changed that (Brooks vs. Norris, 11 How. 204-208) and our federal courts are governed by their own laws and their own practice. But, if we may judge from the defination of filing a bill in chancery given by Daniel in his work on chancery practice, English practice is very like our own in this respect.

"Bill in chancery—how filed."

"*The clerk of records and writs dates it the day that it is brought into his office, numbers it, and receives it into his custody*, the bill is then said to be *filed* and of record, but *before this process is completed, it is not of any effect in court*, and persons to be made parties have no right to take copies of it." Dan. Chan. 2nd Am. Ed. 468-9, Star paging 454. Of course there may be found some loose definitions of filing scattered through the books, but they serve only as exceptions to prove the proper definition of the term.

In Iturbide's Executors vs. United States, 22 Howard,

290, a statute requiring the *filing* of a bond is held to be mandatory.

An order denying a motion for a new trial signed by the judge *does not become effective until filed of record in the clerk's office.* Danielson vs. Fuel Co., 55 Fed., 49.

The decisions of the state courts though not authoritative upon this question in this court, are, on the whole, in line with those already given.

The leading case on this subject in this State is Tregambo vs. Comanche M. & M. Co., 57 Cal. 501, which gives only the partial definition of filing. It defines filing on the part of the party or attorney only. "In this state a paper is deemed filed when delivered to the clerk and the clerk's fees paid if demanded." We do not dispute this definition as far as it goes. We only claim that it does not cover the ground. Smith vs. Biscailuz, 83 Cal. 539, holds that "It is premature to enter the default of a defendant whose demurrer is on file undisposed of although the demurrer has not for want of fees paid been endorsed filed. 'Tis an old rule, and it was the rule of that court, that demurrers *interposed* should be disposed of before the case could be tried on its merits.

In Howell vs. Slauson, 83 Cal. 544, 'tis held that a list endorsed "list No. 1 Received and filed December 5, 1870," was (of course) filed.

In the case of Holman vs. Chevallier, 14 Tex. 339, a state statute allowed an execution to issue on a judgment after the death of the plaintiff, upon an affidavit of death entered of record or filed with the clerk, together with a certificate of appointment of a legal representative of the deceased plaintiff. There was no doubt that the state law had been sufficiently complied with The presumption in favor of all judgments which cannot be collaterally attacked was also invoked in this

case. The case of Turner vs. State, 41 Tex. 549, referred to in a note to a late edition of Texas Reports in connection with the last case, holds that the omission of a file-mark upon a bail bond would not affect the liability of the obligors on the bond. Of course not.

All the other State Court cases which we have examined, and we have endeavored to examine them all, are all strong in our favor, except perhaps a few that follow some particular provisions of State statutes, and so would not apply to our case. Pfirman vs. Henkel, 1 Bradw. (I 11 App.) 145; Peterson vs. Taylor, 15 Georgia 483 (60 Am. Dec. 705).

Powers vs. State, 87 Ind., 144, 148, arose under a State statute which only required papers to be deposited in the clerk's office, and besides, it was held that the objection to the want of filemark came too late after trial and conviction. The case of Johnson vs. Crawfordsville 11 Ind. 284 arose under a State statute which made a certified copy of articles of incorporation legal evidence, so that the question of filing or filemark cut no figure in the case. Naylor vs. Moody, 2 Blackf. (Ind.) 247, held that under a State statute requiring letters testamentary to be recorded, filing them was not a compliance with the statute.

Under a statute requiring an original document, or a copy thereof, to be filed with the pleadings, it was held that the act was complied with when the document was set out in haec verba in the pleadings. (Of course.) "The mere leaving with the clerk not sufficient unless the purpose of so leaving stated and not left to inference." Lamson vs. Falls, 6 Ind., 309. In Engleman vs. State, 2 Ind., 91, a defendant appeared, pleaded to an indictment, entered into a recognizance for his subsequent appearance, applied for and obtained a change of venue, was tried and convicted, after all which he objected in an appellate court that the indictment had not been properly filed.

It was held not that the endorsement was not necessary but that the objection came too late.

"*Filing signifies more than mere endorsement to that effect*, and comprehends entries made by the clerk on the record." Johnson vs. Hodges, 65 Mo., 589.

In Shore vs. Larsen, 22 Wis., 137-8, a mortgage duly received for record having time when received endorsed upon it held (of course), duly filed. In Smith vs. Waggoner, 50 Wis., 155, *160*, it is held "the filing *and endorsement* are the *principal things to be done*. Entries in the book not essential" See also to same effect Marlet vs. Hinman, 45 N. W., (Wis.) 953.

"Plaintiff cannot contradict clerk's record and show that the certificate was received to be *filed* and not to be *recorded*." Chapin vs. Kingsbury, 138 Mass., 194. Recording not compliance with statute requiring "*filing*." Chapin vs. Kingsbury, 135 Mass., 580. "Clerk's certificate endorsed on instrument is conclusive that it was recorded at the time named therein." Fuller vs. Cunningham, 105 Mass., 442; Tracy vs. Jenks, 15 Pick., 465; Jordan vs. Farnsworth, 15 Gray, 517. Under a statute not requiring endorsement a paper left in the safe at a clerk's house and office held filed. Reed vs. Acton, 120 Mass., 130.

Held mortgage not filed for record until instructions given to record, and then, antedating filing to date of actual delivery of paper to officer, of no effect. Deadman, vs. Earle, 52 Ark., 164: Citing Brown vs Fassett, 37 Ark., 507. In last case held mortgage not filed through endorsed filed, the words "for record" being erased.

A chattel mortgage was endorsed by a person who had charge of the town clerk's office, "Filed October 20, 1845," and placed among chattel mortgages in the office: Held this

was a filing Bishop vs. Cook, 13 Barb. 326 ; Dodge vs. Potter, 18 Barb., 193.

"*Filing a paper is now understood to consist in placing it in the proper official custody, on the part of the party charged with the duty of filing it, and the making of the appropriate endorsement by the officer.*" Phillips vs. Beene's Adr., 38 Ala. 248.

A warrant deputizing an under sheriff filed with the clerk need not be endorsed to make it valid. (Of course not.) Haines vs. Lindsay, 4 Ohio, 88.

All pleadings should be endorsed by the clerk when filed but party deemed to have waived his right to object on that account, after plea, verdict or judgment. Fanning vs. Fly, 2 Coldw. (Tenn.) 486.

"*Filing imports more than a mere reception into the custody of the clerk of the Court; his endorsement is necessary. Pinders vs. Yager, 29 Iowa, 468.*

Under State statutes curing every conceivable defect in legal papers endorsement would not, of course, be necessary.

Rex vs. Wade, 1 B. & A., 861, gives definition of filing on the part of a party or attorney. Only *quaers* as to whether filing is good without endorsement.

A paper is not filed until it reaches place of final custody. Not when it first comes into the hands of the officer of the court. Garlick vs. Sangster, 9 Bing. 46.

But it may be claimed that all the papers involved in this motion were properly endorsed by the clerk of the court below, and that he omitted to copy (or have copied) the endorsements into the transcript of the record which was sent up. And in this connection it may be said that he will be presumed to have done his duty.

Our complete answer to this is, that if he properly endorsed those papers, "it doth not appear" in the transcript and it certainly ought so to appear, and the presumption as to official duty, is, to use a common expression, "as long as it is broad," and would cover his duty to incorporate the endorsements into the transcript as well as his duty to make them. Most of the other papers in the cause were properly and regularly filed and we find those file marks in the duly certified transcript as a part of it. Would the clerk in copying or comparing for certification, have copied and certified the file marks upon SOME, *and omitted to copy or certify the same (if there were any) upon others?* "A question not to be asked." No; the truth and the fact is that the clerk of the court below was not requested to file these papers before the transcript was made and sent up. We had the records of the lower court searched after the transcript came here *and there was no file mark on them then, nor were they entered in the register as "filed." If these papers are now properly endorsed and entered, it was an afterthought done either with, or without the order of the court or judge, and cannot affect us. The clerk has no authority to change the file mark on papers filed by him. Warner vs. T. & P. R. Co., 54 Fed., (C. C. A.) 920, 921, and, of course, no authority to file papers which he is not ordered or requested to file. Even if the clerk of the court below could, by a nunc pro tunc order of court file all the other papers which counsel have neglected to have filed, which, under the authority of the Credit Co. vs. R. Co. supra, we most emphactically deny; yet, this procedure could not apply or be applied to the* ORIGNAL *citation and writ of error which came up with the transcript and are beyond the control of the clerk of the lower court or even of the lower court itself.* These, at least, are secure. *We stand upon our record. The transcript af the record, like every record, and especially these original papers, imports verity.*

What says the Supreme Court, Chief Justice Taney

speaking for the court, "*Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record as certified and returned by the clerk of the Circuit Court can be received here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court.*" Hudgins vs. Kemp, 18 How. 530, *534*. The clerk is not to blame for not doing what he was not requested to do, nor for not doing, whether requested or not, what it was counsel's duty to do. "The fact that the clerk of the Circuit court in preparing transcripts on appeal to this court, labored under a mistake as to the time within which the transcripts were required to be filed is not a valid excuse for a failure to file them within the time prescribed by the established rules." Richardson vs. Green, 130 U. S., 104 (9 S. C. R. 443). *And this court cannot in support of its jurisdiction rely upon any recital in the petition for writ, order allowing writ, or even in the clerk's certificate, if such recital is unsupported by the original writ. The clerk cannot make a record of what is not a record. That any matters are certified by the clerk does not make them part of the record.* Reed vs. Marsh, 13 Pet. 153; Fisher vs. Cockrell, 5 Pet., 248, *254*. And if the clerk cannot by certifying it make that of record which is not, *certainly counsel cannot patch up a record by recitals in draft orders, bonds or other papers. A recital in a citation, even, that an allowance of an appeal was obtained at a certain time, does not prove the fact.* Edmondson vs. Bloomshire, 7 Wall. 306, *313*. So in Sage vs. R. Co., 6 Otto, 712-16, the Supreme Court says: "It is true that the bond accepted in this case, recites an allowance of an appeal in open court, *but this is mere surplusage, etc.*" "The return of process contained in the record on appeal must control, etc, *no presumption can be indulged that there was some other and different service of process* made from that which

appears in the record." Lonkey vs. Keys S. M. Co., S. C. of Nevada, and cases cited (17 L. R. A. 351). Presumptions cannot controvert facts and there are no presumptions in favor of the jurisdiction of the United States courts. "*An unnecessary statement in the Marshal's return is not conclusive of the court's jurisdiction.*" The Lindrup, 70 Fed. 718.

The fact that neither clerk nor counsel deemed it necessary to file certain papers, or KNEW HOW *to file them properly*, would be no excuse for their not being properly filed.

In the State of Florida the C. H. Phosphate Company, 70 Fed. (C. C. A.) 883, *885*, already cited, the court says: "It is claimed that this failure to file the order of enlargement was a neglect of the clerk of the lower court for which the appellant is not responsible. We cannot assent to this. * * * *It was not the business of the clerk of the Circuit Court, to obtain such an order, file it in his office, or transmit it to the Court, but it was the duty of the appellant not only to procure the order, but to see to the proper lodgment of the same.*" See also Warner vs. T. &. P. R. Co., 54 Fed 920, already cited. "It is no part of the clerk's duty as clerk to procure the allowance of writs of error and the approval of bonds for appeals for writs of error. This is the office of parties, or of their attorneys and solicitors. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary endorsement on the writ of error. He relied on the clerk to do for him what the clerk s under no official obligation to do. He complained w .i no very good grace of the manner in which the clerk performed a purely voluntary service for his accomodation and at his request, etc."

In the case at bar there does not appear to have been any such request, even, made of the clerk.

In Gregory vs. Pike, (C. C. A.) official reports Vol. 21,

part 4, page 477, the court says: "We have no power to compel any party to bring up a record (unless by certiorari). * * * *We have, however, an inherent power to dismiss unless a proper transcript is filed, which may be exercised under the rules* or *specially*."

Our next motion is to dismiss or quash the writ of error in this cause for want of jurisdiction, because in the first place;

1. NO PROPER OR LEGAL CITATION ON SAID WRIT WAS ISSUED OR SERVED.

A citation is *simply a notice* to the opposite party to appear or decline to appear (Cohens vs. Virginia, 6 Wheat. 264, *411*), *but, in a law case*, and especially after the term at which final judmgent was entered has passed, *it is necessary to give the agppellate court juisdiction.*

"The act of congress makes tde citation necessary in order to remove a case to this court by writ of error." * * * "The case now before us was not brought up by the first writ *for want of a citation."* Hogan vs. Ross, 11 How. 294, *295-7*. Except that when the appeal is prayed at the same term when the decree or sentence is made, a citation is not necessary. The San Pedro, 2 Wheat. 142; Yeaton vs. Lenox, 7 Pet. 220. And *when neeessary the law requires it to be formally and legally correct and proper, and the Supreme Court or Circuit Court of Appeals "has no power to receive an appeal" (or writ of error) "in any other mode than that provided by law."* Villabolos vs. U. S., 6 How. 81, *90*.

The citation in this case is drawn as if it were a writ. It runs in the name of the President of the United States and bears teste of the Chief Justice of the United States. It is, to be sure, signed by the judge instead of the clerk, but it is a general rule of law that a judge can do anything that his clerk can do and a good deal more. *We claim that this citation is*

informal, irregular and ineffective for any purpose. If a citation not properly signed is no citation and the defendant is not bound to appear unless the citation is signed in the manner prescribed by law (U. S. vs. Hodge, 3 How., 534), and a citation not served is as no citation (Loyd vs. Alexander, 1 Cranch, 365), and, if a writ that ran in the name of the Chief Justice of a state Supreme Court, and bore teste of that Chief Justice, was no writ and could not, under R. S. section 1005, be amended because there was nothing to amend (Bondurant vs. Watson, 13 Otto, 278-280); surely we are right in our contention *that this citation is no citation, and although we have admitted service of it, and entered a special appearance, this court has no jurisdiction over us and must dismiss the case.* "*The defendant is not bound to appear here unless the citation is signed,*" (*why cannot we add: and otherwise drawn*) "*in the manner prescribed by law, and as that has not been done in this case the writ must be dismissed.*" U. S. vs. Hodge, *supra.*

"Where it appears * * * that *no citation has been issued to the defendant the writ must be dismissed.*" Hogan vs. Ross, *supra.*

"The record is brought irregularly and the cause must be dismissed." (Because the citation was to appear at the current instead of the next term of the Supreme Court.) Yeaton vs. Lenox, *supra.*

Where, among other irregularities, the citation was issued to one not a party to the record, the case was dismissed, although it undoubtedly gave the proper party notice. Davenport vs. Fletcher, 16 How. 142. And service of a citation on the executrix or law partner of counsel of record, is not sufficient, although the right counsel undoubtedly received notice. "The citation not being served on the party or his counsel, the cause is not brought into this court agreeably to the act of 1789, and the writ must therefore be dismissed for want of jurisdiction."

Bacon vs. Hart, 1 Black, 38, *39*. So if the citation differs from the writ of error in the description of the parties, the case will be dismissed, (Kail vs. Wetmore, 6 Wall. 451,) unless the misdiscription is not sufficient to mislead Peale vs. Phipps, 8 How. 256.

In a late case, says the Circuit Court of Appeals, "The transcript filed in this court does not show that *one* necessary step towards the taking and perfecting of an appeal has been taken, save only the filing in the court below of an assignment of errors." (No citation and no proper bond had been issued or given.) "No appeal having been taken and perfected as required by law and the rules of this court, the cause is ordered stricken from the docket." Phos. Co. vs. Edwards, 70 Fed. (C. C. A.) 728, *729*.

"It has been said *that this objection*" (want of proper citation) "*is a mere technicality and may be regarded as rather a matter of form than of substance, but this court does not feel itself authorized to treat the directions of an act of congress, as it might treat a technical difficulty growing out of ancient rules of the common law. The power to hear and determine a case like this, is conferred upon the court by acts of congress and the same authority which gives the jurisdiction, has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions nor to change or modify them.* And if the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or or injustice, it is for congress to provide a remedy by altering the existing laws, not for the court. And as this appeal has been prosecuted in the manner directed within the time limited by the acts of congress, it must be dismissed for want of jurisdiction" U. S. vs. Curry, 6 How. 106, *113*.

If an appeal bond cannot operate as a supersedeas in a

law case (Saltmarsh vs. Tuthill, 12 How. 387,) how can a *writ* of citation operate as a citation in any case? Of course, counsel may waive service of, or any irregularity in a citation. Bigler vs, Waller, 12 Wall. 142.

"But a citation with due return or a waiver by general appearance or otherwise, is indispensable to jurisdiction on appeal. The writ therefore must be dismissed." Alviso vs. U. S., 5 Wall. 824. At the next term of the Supreme Court, it being shown that a proper citation had been signed, served and filed, and afterwards lost in a fire which destroyed the clerk's office, this Alviso case was reinstated. Alviso vs. U. S, 6 Wall. 457. *And we have not waived this irregularity in the citation by a general appearance or otherwise. We only admitted service and recipt of a copy of an irregular, informal and ineffective document.*

In Van Sant vs. Gaslight Co, 9 Otto, 213, it was held that a citation becomes unnecessary only when an appeal (or writ of error) is allowed in open court during the term at which the decree is rendered. *In the case at bar a cition was necessary because it is a law case and the writ of error was not sued out and allowed during the term at which the judgment was rendered.* If the citation were unnecessary it would not, of course, make any difference whether it were irregular and informal or not. In the case of United States vs. Gomez, 1 Wall. 690, a citation was dispensed with but the case was quite peculiar. An appeal was taken in open court at the same term in which an order restoring an original decree was made and when both parties were in court and a motion was at once made to set aside the order granting the appeal. In such a case the Supreme Court might well hold no citation necessary.

The case of Innerarity vs. Byrne, 5 How. 295, which holds that the citation is not necessarily a part of the record and the case of Pierce vs. Cox, 9 Wall. 786, which holds that the *ap-*

pellant could not dismiss the appeal for want of a citation, the appellee being in court and making no objection to the want of a citation, and the case of Dayton vs. Lash, 4 Otto, 112, 113, which holds that a proper citation properly and actually issued need not be served before the first day of the next term of the Supreme Court in order to preserve the jurisdiction of that court; *do not militate in the least against our position that a proper citation properly issued and served, or a waiver thereof by general appearance or otherwise, is indispensable to the jurisdiction of the appellate court.*

Even after a case was argued and determined in the Supreme Court without an appearance on the part of an appellee, and at the next term it was made to appear on motion that the citation was never served, the court declared its decree of the preceding term null and void and revoked the mandate to the lower court. Ex-Parte Crenshaw, 15 Pet., 119.

And a writ of error to a state court was dismissed because the citation was signed by a district judge instead of by the Chief Justice, Judge or Chancellor of the court rendering or passing the judgment or decree, or by a Justice of the Supreme Court of the United States. Palmer vs. Donner, 7 Wall, 551. Another writ of error to a state court was dismissed because the citation was signed by one of the Associate Justices instead of by the Chief Justice of the State Court. Bartemeyer vs. Iowa, 14 Wall., 27.

The original citation subscribed by the judge must be returned with the writ of error. Wilson vs. Daniel, 3 Dall, 401.

A citation issued on the 27th of August, 1847, could not bring up an appeal returnable to the December term, 1846. U. S. vs. Curry, *supra*.

"The want of proof that the defendant was" (properly) "cited, has always been held to be a fatal defect in the process

prescribed and required by the act of 1789, whereby a party is authorized to bring the judgment of an inferior court before this court for revision—a defect which can be cured only by the voluntary appearance of the party entered on the record. Nor can this mistake be corrected by a citation from this court. The act of congress requires it to be issued by the judge or justice who allows the writ of error and it cannot be legally issued by any other judge or court. The case must therefore be dismissed for want of jurisdiction in this court." Ins. Co. vs. Mordecai, 21 How., 195. See also Porter vs. Foley, 21 How., 393.

Even the presence of counsel in court will not do away with the necessity of a citation and a proper citation. Castro vs U. S. 3, Wall, 46, 51. As to the importance of every step in the proceedings besides the cases already cited see Stm. Virginia vs. West, 19 How., 192; Mesa vs. U. S. 2 Black, 721.

The omission to serve the citation before the return day is fatal. City of Washington vs. Dennison, 6 Wall., 495.

The citation is essential to the validity of the writ and without it the writ will be quashed, and a citation not served is as no citation. Loyd vs. Alexander, 1 Cranch, 365. The writ brings up the record and the citation the parties. Cohens vs. Va. 6 Wheat., 410; Atherton vs. Fowler, 91 U. S. 146.

In Chaffee vs. Hayward, 20 How., 208, a writ of error was sued out in October, 1856, returnable at the December term, next following, but the citation was signed by the clerk instead of the judge. The record was filed with the clerk of the Supreme Court and the case was placed on the docket upon the 24th of November, and on the 4th of December the defendant appeared in that court by counsel. At the next term, December, 1857, a motion was made to dismiss the cause on account of the insufficiency of the citation. Chief Justice Taney in disposing of the motion said: "*The citation is undoubtedly* ir-

regular in this respect, and the defendant in error *was not bonnd to appear under it, and if a motion had been made at the last term, within a reasonable time, to dismiss the cause on this ground it would have been dismissed. * * * The latter (the defendant in error) is not bound to appear unless he is legally cited*, except for the purpose of moving to dismiss."

And right here we may add that neither this court, nor the court below, can allow the citation to be amended A citation to an appellate court is not (nor is a writ of error) included in the 32d section of the Judiciary Act of 1789 (R. S. Sec. 954), sometimes called the statute of amendments and jeofailes, nor is the citation mentioned in the 3rd section of the act of June 1, 1872 (R. S. Sec. 1005). And no admendment of the record is allowed to support the jurisdiction of the appellate court, in accordance with the common law maxim that all amendments are granted for the *support* of judgments not to *reverse* them. Another reason for not allowing amendments to citations, is that a citation may be entirely waived if the case is in other respects regularly brought up, or, the court having by a *proper* writ of error, *properly used*, obtained jurisdiction of the case, can, upon terms and within the lifetime of the writ, allow a new citation to be taken out.

We now come to the *last*, but not *least*, ground of our motion to dismiss for want of jurisdiction, and we beg the court to consider, in this connection, all that we have hitherto said which is applicable to this our principal point. We labor under the disadvantage, or perhaps advantage, of discussing horn-book questions, to any one of which all that may be said upon any one of the others applies. If the court will do this it will save itself and us much vain and tedious repetion.

We have been compelled to allude several times to several leading cases, and the many cases which we cite in this brief

are only a few of those examined, yet we fail to find a single case that either directly contradicts or even seriously conflicts with our contentions. If it be asked why do we go so far back for authorities, we reply that we always like to begin at the beginning, and that these old cases like old landmarks, seem to us more venerable and authoritative than later cases.

II.

THE WRIT OF ERROR HEREIN WAS NOT FILED IN THE COURT BELOW.

This omission to file this writ is apparent on the face of the record, and is fatal to the jurisdiction of this court. If this court *could* overlook the omission of a formal return to the writ of error, and the manifold disobediences of the rules and practice of both this court and the Supreme Court of the United States in proceedings in error already pointed out; it cannot, and, of course, will not disregard the laws governing writs of error as construed by both this court and by the Supreme Court of the United States, the decisions of which courts upon the interpretation and construction of such laws are a part of the laws themselves.

There is "no hinge nor loop to hang a doubt on" about the fact that this writ of error was not filed in the court below.

The original writ of error has come up and proves itself and what has been done, or not done, with it.

In Amis vs. Pearle, 15 Pet., 211, instead of a certificate from the clerk of the court below that the writ of error had been duly sued out and allowed, the original writ of error signed by the clerk of the court below, and also a citation signed by the judge of the court, were produced by the defendant in error, and the court says that the production of the writ of error with the citation was the *highest* evidence of the fact, and that the substance of the rule was complied with.

There is no room for supposition nor assertion here. *The original record or writ certainly imports verity.* See Hudgins vs. Kemp, *supra*. It is what the *record shows* that governs. Bondurant vs. Watson, 13 Otto, *278*, *281*, *285*; O'Dowd vs. Rus sell, 14 Wall., 402, *405*. In this last case *the writ of error was filed in the court below*, although it was by an obvious mistake, which did not vitiate it, antedated.

The jurisdiction of all United States courts is special, and there are no presumptions in favor of their jurisdiction. These propositions rest upon decisions innumerable. Moreover, "The facts upon which the jurisdiction of the courts of the United States rest must, in some form, *appear in the record* of all suits prosecuted before them. *To this rule there are no exceptions.*" Ex l'arte Smith, 4 Otto, 455, 456. Carter vs. Bennett, 15 How., 354-357. "And if a defect in jurisdiction appear in this transcript it cannot be cured by amendment because consent cannot give nor legalize jurisdiction." Mordecai vs. Lindsay, 19 How., 199, *200*; Balance vs. Forsyth, 21 How., 389.

As long ago as 1789, the Supreme Court of the United States held: "This court will not take cognizance of any suit or controversy which was not brought before them by the regular process of the law." Dewherst vs. Coulthard, 3 Dall., 409.

No amendment can be allowed to be made to this writ, not only on account of the old common law maxim already alluded to, and because the power of amendment presupposes the juisdiction of the court which attempts to exercise it; but because the defect (want of filing in the court below) *is not a defect of form.* This writ *does not lack form* even a little: it lacks *proper use*—execution—a much more serious and *fatal lack.* Until the act of June 1, 1872 (R. S. Sec. 1005), no writ of error was amendable in the Supreme Court *in any particular, even by consent of parties.* Hodge vs. Williams, 22 How., 87. Since then the Supreme Court of the United States may,

in its discretion, allow a writ of error to be amended, *in some cases*, and in particulars of *form only*. *This case does not come within the terms of that section*, even if this court were the Supreme Court.

In Mossman vs. Higginson, 4 Dall., 12, a writ of error duly issued and *filed* in the court below, was allowed to be amended by filling a blank left for the return day, there being an endorsement on the writ of the return day; but the writ was dismissed after all because the record did not show jurisdiction,

Nor can certiorari reach this defect of filing. A writ of certiorari, if seasonably and properly applied for, can bring up any omitted portion of the record of what *was done* in the court below. What was *not done, and so could not become of record*, cannot, of course, be brought up by such a writ. And a motion for certiorari to supply defects in the record, even, will be denied, the court being satisfied from an inspection of the record that the granting of the motion would avail nothing, it being necessary to dismiss for want of jurisdiction. Brown vs. Willey, 4 Wall., 165.

The omission of a clerk's certificate cannot be remedied by certiorari. Hodges vs. Vaughan, 19 Wall. 12.

We have not, even if we could have, waived our right to make this motion, either by a *general* appearance, by *unnecessary delay*, or *in any other way*.

"Want of citation may be waived, but *not want of regular writ of error*, and although a motion to dismiss for want of citation must be made at the first term at which the party appears, yet the want of a writ of error, such as is prescribed by the act of congress, stands on different ground." Even a general "appearance does not preclude the party from afterwards moving to dismiss for want of jurisdiction, or upon any other sufficient ground. And in the case of the United States

vs. Curry, supra, the court held that where the power of the court to hear and determine a case is conferred by acts of congress and the same authority which gives the jurisdiction points out the manner in which it shall be brought before us, we have no power to dispense with the provisions of the law, nor to change or modify them. Upon this ground (no proper writ of error) the case is not legally before us, and must be dismissed for want of jurisdiction." Carroll vs. Dorsey, 20 How., 204, 208.

The Supreme Court in Mussina vs. Cavazos, supra, says: "It cannot, therefore, be maintained that a rigid and literal fulfillment of everything prescribed in that section (R. S. 997) is an absolute and indispensable requisite to the appellate jurisdiction of this court" to justify itself in merely overlooking the want of a return of an original writ of error that had been duly issued, *filed* and served and a certified copy sent up with the transcript, the original having been burned before it reached the appellate court. This very case, one among many, illustrates the strictness with which all provisions of law for review to appeals or writs of error are interpreted and construed.

"The rules, regulations and restrictions as to the time within which the writ of error may be brought, and when it shall operate as a supersedeas, the citation, the security to be given, and the restrictions upon the appellate court as to reversal are all applicable" (to an appeal as to a writ of error.) The San Pedro, *supra*.

Counsel have maintained, even in the Supreme Court of the United States, that the writ of error is a "useless, antiquated document." McVeigh vs. U. S., 8 Wall., 640. But what says the Supreme Court: "This court has no appellate power over the judgment of the court below, *unless the judgment is brought here according to the act of congress*—that is, by

writ of error. * * * *This writ is not mere matter of form, but matter of substance, prescribed by law and essential to the jurisdiction of this court.*" Hoge vs. Williams, 22 How, 87.

"And it is *immaterial in this respect whether it was the mistake of the party or of the court.* For this court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of congress regulating appeals and writs of error upon any equitable ground. No such power is given to them by law." Saltmarsh vs. Tuthill, 12 How., 287, *289*.

And, since by the act of 1803, (R. S. Sec. 1012,) the same rules, regulations and restrictions, as are or may be prescribed in law in cases of writs of error apply to appeals; all the decisions imposing the strictest possible construction upon the provisions of law for review by appeal apply equally to the provisions for review by writ of error.

To show how particular and exacting the Supreme Court is with regard to writs of errors: Prior to the adoption of the act of May 8, 1792, (R. S. Sec. 1004), a clerk of a circuit court could not issue the writ. West vs. Barnes, *2* Dall., 401.

"A paper, not a proper writ of error, cannot be amended, and as such a writ" (why cannot we add a proper writ properly used) "is necessary to our jurisdiction the suit is dismissed." Bondurant vs. Watson, 13 Otto, 278, 281.

A writ of error without a seal is void. Overton vs. Cheek, 22 How., 46; Washington vs. Dennison, 6 Wall., 495.

So if the names of the parties are not set forth in the writ it will be dismissed. Deneale vs. Shimp, 8 Pet., 526; Wilson vs. Ins. Co., 12 Pet., 140; Smyth vs. Strader, 12 How., 327.

"If the writ of error had been served when it was not in force, that is, after its return day, such service would have been void." Wood vs. Lide, 4 Cranch, 180.

"The writ has become a nullity because it was not returned at the proper term. It cannot of course, be a legal instrument to bring the record of the Circuit Court before us for revision." Hamilton vs. Moore, 3 Dall., 371; Blair vs. Miller, 4 Dall., 21.

The right to a writ of error ought not to be finally passed upon by a judge at chambers. Buel vs. Van Ness 8 Wheat., 312.

"It behooves this (the Supreme) Court in every case, more especially in this case, to examine into its jurisdiction with scrutinizing eyes before it proceeds to the exercise of a power which is controverted." Worcester vs. Georgia, supra 536.

A motion to dismiss for want of jurisdiction, will always be heard in advance of argument on the merits. Semple vs. Hager, 4 Wall., 431. The sillabus in this last case reads: "*When want of jurisdiction is patent or can be readily ascertained by an examination of the record* in advance of the examination of the questions on the argument of the merits, this court will entertain and act upon a motion to dismiss for want of jurisdiction." And the syllabus of Edmondson vs. Bloomshire, 7 Wall., 306, 313: "*If it is apparent from the record that this court has not acquired jurisdiction of a case for want of proper appeal or writ of error, it will be dismissed though neither party ask it.*"

In United States vs. Bannister, 70 Fed., 44, the court says: "The defendant has moved to dismiss the writ, etc., for irregularities on a special appearance for this purpose. As these things are apparent from the process and return as a part of the record, this mode of objecting to them seems under the practice of the state" (and we may add of the United States) "to be proper."

In Hunt vs. Blackburn, 127 U. S. 774 (8 S. C. R. 1395)

says the Supreme Court: "After an examination of the record in this case which was submitted on printed arguments we have not been able to find any evidence of the value of the land in controversy which is the subject of this suit. It is therefore dismissed for want of jurisdiction."

Upon the question of jurisdiction of the appellate court, the Supreme Court in the case of Edmondson vs. Bloomshire, *supra*, "*And the court has never hesitated to act* * * * although *no motion to dismiss was made by either party. In fact, treating it as a matter involving the jurisdiction of the court we cannot do otherwise.* In the case of U. S. vs. Curry, Chief Justice Taney, answering the objection that the rule was extremely technical, replied that *nothing could be treated by this court as merely technical and for that reason be disregarded which was prescribed by congress as the mode of exercising the court's appellate jurisdiction.* We make the same observation now and add that it is better if the rule be deemed unwise or inconvenient to resort to the legislature for its correction than that the court should depart from its settled course of action for a quarter of century."

A question of jurisdiction cannot be waived. Mex. Nat. R. R. Co. vs. Davidson, 157 U. S., 201. And the circuit court of appeals cannot take knowledge, actual or judicial, of what may appear upon the records of the district and circuit courts within the boundaries of the judicial circuit; and to support the right of appeal, cannot assume the existence of necessary facts which do not appear of record in such court. Fitzgerald vs. Evans, 49 Fed. (C. C. A.), 423.

It is idle to claim that the writ was properly brought because the office of a writ has been performed. In a late case a writ of error was allowed, a bond filed, and a citation issued *all in good time;* but says the court, "The record, however, does not show that any writ of error was actually issued in the

case. On this state of facts the motion made to dismiss the case for want of jurisdiction must be granted. (Citing) Mussina vs. Cavazos, 6 Wall, 355, 358: Ex Parte Ralston, 119 U. S. 613 (7 S. C. R. 317) So ordered" Smith vs. Ferst, 66 Fed. (C. C. A) 798. The court has absolutely no jurisdiction without a writ of error. Even argument and submission on the merits cannot waive this. Stevens vs. Clark, 62 Fed. 321.

The purpose of the writ would have been accomplished by procuring the transcript of the record from the clerk of the court below, and filing it in this court, but such a proceeding could not confer jurisdiction upon this court. Not even consent of counsel to dispense with the writ, or with any necessary action under it, could give this court jurisdiction. Mordecai vs. Lindsay, 19 How., 199; Balance vs. Forsyth, 21 How., 389.

Now what is the law with regard to filing writs of error?

The original judiciary act of 1789, the act of 1792, which provides that the writ of error may be sued out either from the Supreme Court of the United States or from the Circuit Court of the United States (under this act the form of a writ of error was devised by the justices of the Supreme Court and transmitted to the clerks of the Circuit Courts); and the act of 1803, which separates appeals in equity and admiralty from writs of error in law cases, but subjects appeals to the same rules and regulations and restrictions as are or may be prescribed in law in cases of writs of error, as interpreted and construed by the courts; are all not only *sub silentio*, but *expressly* included and re-enacted in the 11th section of the judiciary act of 1891,—the act establishing this court,—a portion of which 11th section reads: "All provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act * * * ."

If the act of 1891, had merely authorized appeals and

writs of error without reference to previous provisions of law, the provisions of all these judiciary acts would still apply. Castro vs. U. S., 3 Wall, 46, 51; U. S. vs. Pacheco, 20 How., 261, 264; Thomas vs Harvie's Heirs, 10 Wheat., 146.

"Brought" in the original judiciary act of 1789, and in the Revised Statutes, Section 1008, is equivalent to "sued out" in the same original act, as amended, and in the Revised Statutes, section 635, and in the judiciary act of 1891, section 11. This is illustrated and acted upon in every case involving the time within which review by appeal or by writ of error in an appellate court can be had. The cases which follow sufficiently sustain this interpretation and construction.

A writ of error then is not brought or sued out, in the legal meaning of the term, until filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court and gives that court jurisdiction of the case. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question of jurisdiction.

The leading case on the subject is so short and to the point, that we beg to quote nearly the whole of it. Chief Justice Taney delivered the opinion of the court.

"This case is brought here by writ of error * * * and a motion has been made to dismiss the writ. It appears by the record that the judgment was rendered on the 25th day of October, 1843. The writ of error by which the case is brought here was allowed on the 19th of October, 1848, and the bond also bears date on that day. But the writ of error was not issued until the 4th of November following. It was issued by the clerk of the court in which the judgment was rendered and on the same day, *as appears by endorsement upon it, filed in that office* by the counsel for the plaintiff in error.

More than five years from the day of the judgment had therefore elapsed *when this writ of error was filed.*"

The act of 1789 c. 20, Section 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. *The writ of error is not brought in the legal meaning of this term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court,* and the period of limitation prescribed by the act of congress must be calculated accordingly. *The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question.*

In this case, therefore, five years had elapsed before the writ of error was brought and the limitation of time in the act of congress was a bar to the writ. According to the English practice, the defendant in error must avail himself of this defense by plea. * * * But according to the established practice of this court he need not plead it, but may take advantage of it by motion. The forms of proceeding in the English courts of error have never been adopted or followed in this court, and either party, without any formal assignment of errors, or plea, may avail himself of any objection *which appears upon the record itself.* In this case the bar arising from the lapse of time, is *apparent on the record and the defendant may take advantage of it by motion to quash or dismiss the writ.* * * * The writ must be dismised upon the ground that it is barred by the limitation of time prescribed by the act of congress." Brooks vs. Norris, 11 How., 204-208.

According to this case the question of the jurisdiction of this court not only turns upon the *filing and endorsement thereof of this writ in the court below but any objection apparent upon the face of the record can be taken advantage of by motion to quash or dismiss the writ.* This case not only decides

our motion but *justifies* us in thus bringing the question up by motion.

And this case does not stand alone. It is cited and followed in a long line of cases, federal and state. Mussina vs. Cavazos, 6 Wall., 355, 363; Cummings vs. Jones, 104 U. S., 419: Scarborough vs. Pargoud, 108 U. S., 567 (2 S. C. R. 877); Pollys vs. B. R. Impt. Co., 113 U. S., 81 (5 S. C. R. 369); Credit Co. vs. Ry. Co, 128 U. S, 258, (9 S. C. R. 107,); Farrar vs. Churchill, 135 U. S. 609 (10 S. C. R. 771); U. S. vs. Baxter, 51 Fed. (C. C. A,) 624; U. P. Ry. Co. vs. C. E. Ry. Co., 54 Fed. (C. C A), 22; Warner vs. T. & P. Ry. Co., 54 Fed., (C. C. A), 920, 921, 922; Stevens vs. Clark, 62 Fed., (C. C. A), 321; Threadgill vs. Platt, 71 Fed., 1; Crippin vs. Livingston, 12 Fla., 638; and Wright vs. Hughes, 2 Green, (Iowa), 142.

If there is safety in the multitude of authorities, we are certainly safe in our contention and position.

In the case of Mussina vs. Cavazos, supra, the original writ of error had been destroyed by fire during the late civil war, so that it could not be returned with the transcript and the court was therefore asked to dismiss the case for want of jurisdiction. This it declinee to do because the writ had been duly issued and *filed* in the court below as appeared from a copy of it in the transcript. Besides the case of Brooks vs. Norris, the case of Ableman vs. Booth, 21 How., 506, is cited to the point that it is *the filing of the writ in the court which rendered the judgment and not even the return of the writ which is the principal, the indispensable requisite to the jurisdiction of the appellate court.*

The case of Polleys vs. R. R. Improvement Company, supra, turns upon the file mark of the clerk of the court to which the writ was directed. "It follows that the writ of error in this case was brought five days after the two years allowed by law had expired; and it must be dismissed."

In the Credit Company vs. Railway Company, supra, the record on appeal shows that the petition for appeal, the allowance, citation and bond were *endorsed filed by the clerk of the court below five days after* the time within which an appeal could be taken had expired, and the appeal was accordingly dismissed, although argued and submitted to the appellate court upon its merits without objection of making a motion to dismiss and so far as the delay of five days could be waived by the parties, it was waived, and although an attempt was made to cure this defect of jurisdiction by an order of court nunc pro tunc. As to which last effort the court says: "When the time for taking an appeal" (or suing out a writ of error, see R. S. section 1012, and even the former portion of this same decision) "has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken" (or a writ of error sued out) "would be a dead letter. The appeal must be dismissed."

In case of Farrar vs Churchill, supra, a final decree was rendered November 5, 1885. On October 31, 1887, certain defendants presented a petition for a cross-appeal to a justice of the Supreme Court and obtained an allowance thereof, an appeal bond being approved and a citation issued on that day. This petition was filed in the circuit court on the 7th day of November, 1887. By an endorsement upon the citation service of the same was accepted and an appearance of appelle entered on the 5th day of November, 1887 And yet, the Supreme Court dismissed the crossappeal. "Crossappeals must be prosecuted like other appeals. * * * And so when a crossappeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the crossappeal under the statute. As in this case the petition, order and bond *were not filed in the Circuit Court* until after two years had elapsed from the entry of the decree the crossappeal must be dismissed."

This certainly illustrates the fact that the right of review is strictissimi juris; although the crossappeal was allowed by a justice of the Supreme Court of the United States, a bond was approved, and a citation issued and served, *all in due time*; yet, because the petition for, and the allowance of, the cross-appeal was not filed in the court below until two days after the time within which to appeal had elapsed, the crossappeal *was summarily dismissed, an order nunc pro tunc to the contrary notwithstanding.*

If this were only the practice of the Supreme Court it would suffice for us, because Rule 8 of this court adopts that practice; but it is the law and practice of all the courts of the United States incorporated even in the last judiciary act—the act establishing this court—and as expounded by the highest court in the land, or for that matter in any land, and followed by all other United States Courts, it is as inexorable as a law of the Medes and Persians. Although the Supreme Court very properly leads the way in this most sound exposition of this law, all the other courts follow in its footsteps. The leading case on this subject in the Circuit Court of Appeals is the case of the United States vs. Baxter, 51 Fed. (C. C. A) 624. And 'tis enough for us to say of that case that it covers the ground. The case of the U. P. Ry. Co. vs. The C. E. Ry. Co., 54 Fed., (C. C. A.), 22, cites and follows the leading case but adds nothing to it.

The case of Warner vs. T. & P. Ry. Co., 54 Fed (C. C. A), 920, 921 and 922, is, in addition to the main point decided, so instructive in many respects, that we cannot forbear quoting some of it.

"The policy of the law in the creation of this court shows marked liberality in allowing appeals from trial courts in all cases, and, on the other hand, requires a speedy prosecution of all appeals or writs of error. It is no part of the clerk's duty,

as clerk, to procure the allowance of writs of error and the approval of bonds of appeals or writ of error. This is the office of parties, or of their attorneys and solicitors. It is also clearly not the duty of the clerk, or his privilege, to change the writ of error after it is allowed by erasing and inserting a date, or by adding a date, any more than it is to make any other alteration in such papers. Nor may he without the order of the proper court or judge, erase *his own file mark* on a paper which parties have procured to be filed. * * * The parties have a right to appeal or sue out writs of error from all final judgments or decaees and from certain interlocutory decrees, if that right is *invoked* in time and *in the prescribed form.* A part of this prescribed form is for one of the judges of the trial court to allow the appeal or writ of error, and the appeal or writ of error is not 'taken or sued out' until that allowance is obtained. Barrel vs. Trans Co., 3 Wall., 424; Brooks vs. Norris, 11 How., 204; Scarborough vs. Pargoud, 108 U. S. 567. And parties and their attorneys sometimes incur serious hazard of losing their right of appeal by omitting to take the proper steps in due time. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary endorsement on the writ of error. He relied on the clerk to do for him what the clerk was under no official obligation to do. He complains, with no very good grace, of the manner in which the clerk performed a purely voluntary service for his accomodation and at his request." In this case, the petition for, and allowance of, the writ of error, and the writ of error itself, having been filed in the lower court in time, the motion to dismiss was, of course, denied.

In the next Circuit Court of Appeals case cited, the case of Stevens vs. Clark, supra, the court says:

"The Supreme Court has uniformly held that it can ob-

tain appellate jurisdiction in a case at law only by the issuing by the proper authority of a writ of error, and by filing the same in the court which rendered the judgment. Consent will not give jurisdiction and *if at any time the record does not show the necessary facts to give the court jurisdiction, the court will dismiss the case.* The jurisdiction of all the United States courts is special. The Supreme Court and the Circuit Court of Appeals possess no appellate power in any case unless conferred upon them by act of congress; nor can such jurisdiction when conferred, be exercised in any other form or by any other mode of proceeding, than that which the law prescribes." (Citing a good many cases)

In Threadgill vs. Platt, supra, says the Court: "The appellate court cannot entertain a writ of error until it is *filed in the court which rendered the judgment.* (Citing our cases.) *To give the Circuit Court of Appeals jurisdiction the writ of error must be issued and filed by the court below* within the time prescribed by law." We intended to quote these last two decisions almost *in extenso*, but we forbear and leave it for the court to refresh its memory of them.

We cite only two state court cases because we do not deem them entitled to much weight. Decisions of state courts upon United States laws and practice are not binding upon United States courts. Section 914 of the Revised Statutes of the United States which assimilates United States with State practice, as far as may be, "does not extend to means of enforcing or revising a decision of a federal court, or to the manner or time of taking a case from one federal court to another by writ of error, bill of exceptions or appeal." U. S. vs. Train, before Mr. Justice Gray, 12 Federal, 852. See also Castro vs. Uriarte, Id. 259 "State practice must give way whenever to adopt it would be inconsistent with, defeat the purpose, or impair the effect of, legislation of congress." Luxton vs. U. R.

Bridge Co., 147 U. S., 337 (13 S. C. R 356) and cases cited. Also Chappell vs U. S., 16 S. C. R. 397. "The power of making amendments and the mode of removing a case from an inferior to an appellate court of the United States are regulated by acts of congress, and do not depend upon the laws or practice of the State in which the court may happen to be held." Hudgins vs. Kemp, supra, 536, beginning at the bottom of the page; Gelston vs. Hoyt, 3 Wheat., 246.

In Crippin vs. Livingston, supra, the court cites and follows our leading Supreme Court authority and in Wright vs. Hughes, supra, the court says: *"In order to prevent abuse of the law"* (limiting time in which to appeal or sue out writ of error) "we deem it the safest rule to be guided by the date the writ was served upon or *filed by the clerk of the district court to whom it is directed. * * * The motion to dismiss is granted.*"

There can be no possible shadow of a doubt about either the law or the facts involved in these motions.

The writ of error in this case was not even *issued at all* nor *delivered to nor received by anybody*, nor deposited anywhere (although it was entered in the law register of the court below as having been *issued, not* as having been filed.) To issue is *"to sue out or deliver officially."* This was not so set out, until it was sent up here, and it was not delivered to or received by anybody or deposited anywhere, until it was sent up and deposited here, where it was for the first time in its life, both deposited and filed.

The writ of error in this case was not even issued or deposited anywhere, although it was entered in the register of the court below as having been issued (*not filed.*) To issue is to "send out" or "deliver officially." This writ was not so sent out until it was sent up and deposited here *where it was for the first time both deposited and filed.* A paper cannot be said

to *be issued* to a party or attorney, when it is *simply made out*, nor can it be said to be *filed or even deposited when it is simply left uncalled for with the person who made it out*

We have now arrived at the end of our *brief* journey and we rest, confident that the court will carefully consider all our several points, arguments, and authoricies, *all converging and merging, as they do, in the* ONE POINT—THAT THE ONLY WAY KNOWN TO THE LAW WHEREBY A CASE AT LAW CAN GET INTO AN APPELLATE COURT HAS NOT BEEN FOLLOWED IN THIS CASE, AND THAT CONSEQUENTLY THIS COURT HAS HO JURISDICTION OF IT, AND IT MUST BE DISMISSED.

Respectfully submitted,

LORENZO S. B. SAWYER,

Counsel for the Defendant in Error for the purposes of the motions

S. WARBURTON AND A. F. BURLEIGH,

Of Counsel for Defendant in Error.

No. 85.

FILED
OCT 11 1898
JAMES H. McKENNEY,
CLERK

Brf. of Warburton & Burleigh

IN THE

United States Supreme Court.

Filed Oct. 11, 1898.

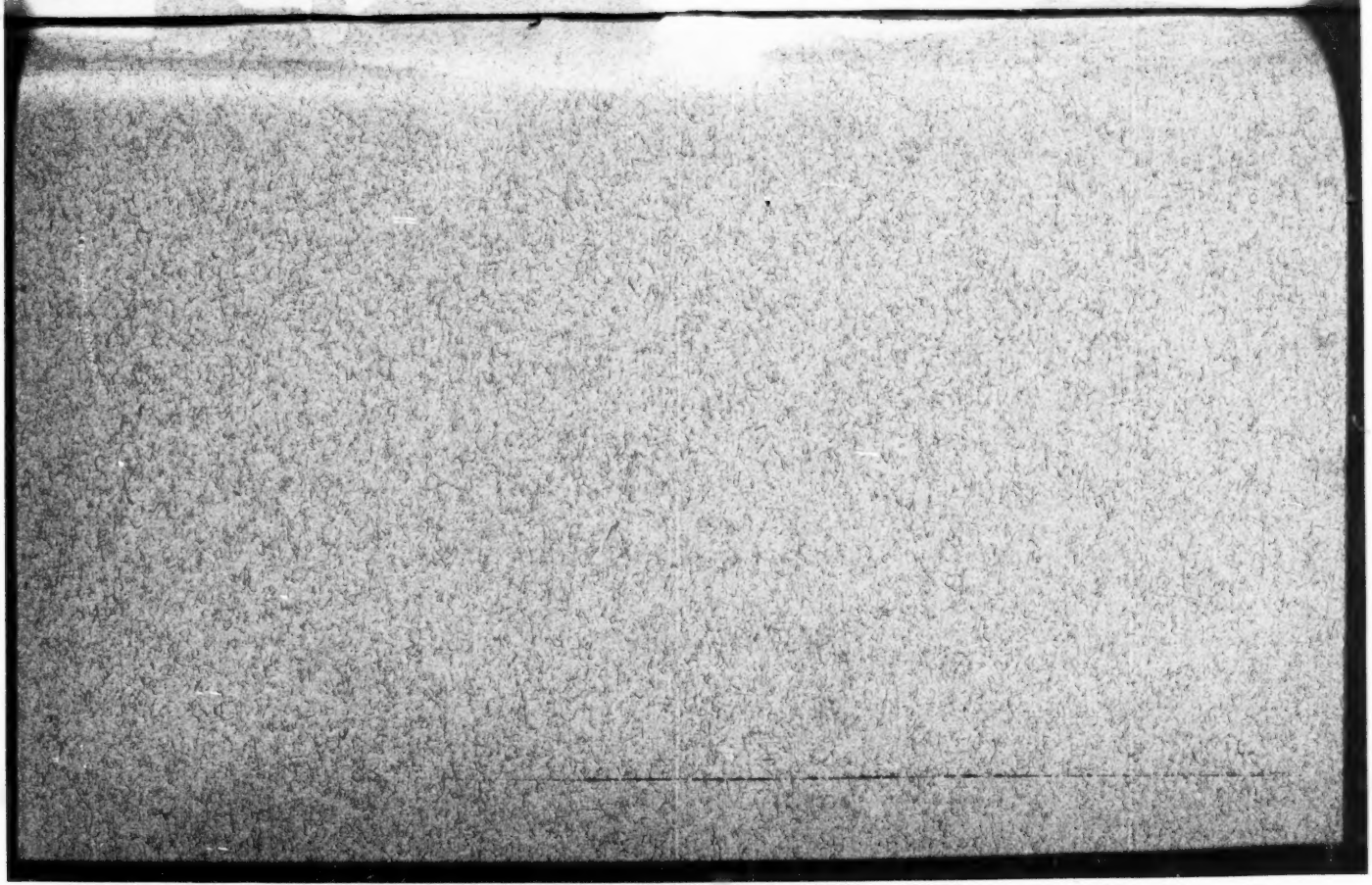
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
versus
NELLIE PHINNEY, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF GUY C. PHINNEY, DECEASED,
Defendant in Error.

No. 85.

On Certiorari to the Ninth Circuit Court of Appeals.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STANTON WARBURTON,
Attorney for Defendant in Error,
A. F. BURLEIGH,
of Counsel.



SYNOPSIS OF ARGUMENT ON MOTION TO DISMISS AND ON MERITS

Argument on Motion to Dismiss.

1. It is the filing of the writ which gives the Circuit Court of Appeals jurisdiction, - pp. 3 to 18
2. There was no evidence that the writ had been filed in the lower court, - - - pp. 18 to 28
3. Affidavits of Clerk do not show filing of writ p. 28
4. No evidence that the writ was filed prior to to the issuance of the citation, - - - p. 28

ARGUMENT ON MERITS.

1. Contract was a New York contract, as it was to be performed wholly in New York pp. 36 to 47.
2. The cases relied on contrary to the above proposition distinguished, - - - - - pp. 47 to 52.
3. The Statute of New York is a limitation on the power of the corporation and it cannot make any contract contrary thereto, no matter where made :
   - *a The highest court of New York has so held* pp. 52 to 55
   - *b The language of the act is susceptible of no other construction* - - - - - - - pp. 55 to 61
4. The statute of New York could not be waived: - - - - - - - - - - - - pp. 61 to 69
   - *b The statute of New York being a limitation on the power of the corporation, could not be waived* - - - -
   - *c New York being the place of performance of the contract, this waiver being void here is void everywhere* - - - - pp. 69 to 73
5. Knowledge of the due date of the premium does not avoid the service of the statutory notice:
   - *a Requested instructions on the above proposition assumed facts of which there was no proof* - - - - - - - - - - - pp. 74 to 77
   - *b Knowledge of the due date of the premium does not avoid statutory notice* - - - pp. 77 to 80
   - *c The Company disclaimed any reliance on service of the statutory notice* - - - - pp. 80 to 82

6. Defendant in error did prove her action as alleged - - - - - - - - - - - - pp. 82 and 83
7. It was not necessary for defendant to tender any premium - - - - - - - - - pp. 83 to 86
a *No tender was necessary because the Company had denied all liability on the contract* - - - - - - - - - - - - pp. 86 to 88
8. The contract was not waived, abandoned, or rescinded. No evidence justifying the court's submitting that question to the jury:
a *The Company never claimed the contract to have been waived, or abandoned, until it filed its answer* - - - - - - - - pp. 88 to 91
b *There could be no waiver of the statue* - pp. 91 to 92
c *Nonpayment of premium is not abandonment* pp. 92 to 93
d *The Company could not rescind except on failure of Mr. Phinney to perform contract* p. 93
e *The Company broke the contract by preventing Mr. Phinney from paying the premium* pp. 93 to 94
f *The Company refused the premium and instructed its agent never to accept it* - - p. 94
g *No party to a contract can rescind until he returns or offers to return all consideration he has received thereunder* - - - pp. 94 to 96
h *None of the alleged facts which the Company claims constitutes a waiver and abandonment were known by it* - - - - - pp. 96 to 98
i *Mr. Phinney never made a binding admission that the policy was forfeited* - - - pp. 99 to 104
j *Mr. Phinney's executrix is not estopped from enforcing the contract* - - - - - pp. 104 to 110
k *If there is any evidence of estoppel it is against the Company and in favor of defendant in error* - - - - - - - - pp. 110 to 111
9. If there was any evidence tending to show an estoppel, waiver, abandonment or rescission and surrender of the contract, these matters were submitted to the jury under proper instructions, and their verdict is conclusive - - - - - - - - pp. 112 to 113.
10. Plaintiff in error requested the court to repeat the charge of which it now complains, and thus made the court's charge its charge - - - - - - - - - - - - pp. 113 to 115
CONCLUSION, - - - - - - - - - - - - - pp. 115 to 118

Statement and Argument on Motion to Dismiss.

The original writ of error sued out in this cause was returned by the clerk of the Lower Court to the Circuit Court of Appeals without any endorsement or evidence that the same had been filed. The Circuit Court of Appeals dismissed the writ on the grounds that there was no evidence that the same had been filed in the Lower Court. We maintain that the Circuit Court of Appeals for the Ninth Circuit was right in granting the motion of defendant in error to dismiss.

I.

THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS DID NOT OBTAIN BECAUSE THERE WAS NO EVIDENCE IN THE RECORD OF THE FILING OF THE WRIT. IT IS THE FILING OF THE WRIT WHICH DEPRIVES THE LOWER COURT OF JURISDICTION AND GIVES IT TO THE UPPER COURT.

Now what is the law with regard to filing writs of error?

The original judiciary act of 1789, the act of 1792, which provides that the writ of error may be sued out either from the Supreme Court of the United States or from the Circuit Court of the United States (under this act the form of a writ of error was devised by the justices of the Supreme Court and transmitted to the clerks of the Circuit Courts); and the act of 1803, which separates appeals in equity and admiralty from writs of error in law cases, but subjects appeals to the same rules and regulations and re-

strictions as are or may be prescribed in law in cases of writs of error, as interpreted and construed by the courts; are all not only *sub silentio*, but *expressly* included and re-enacted in the 11th section of the judiciary act of 1891,—the act establishing this court,—a portion of which 11th section reads:

"All provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act * * * ."

If the act of 1891, had merely authorized appeals and writs of error without reference to previous provisions of law, the provisions of all these judiciary acts would still apply. Castro vs. U. S., 3 Wall, 46, 51; U. S. vs. Pacheco, 20 How., 261, 264, Thomas vs, Harvie's Heirs, 10 Wheat 146.

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point, that we beg to quote nearly the whole of it. Chief Justice Taney delivered the opinion of the court.

"This case is brought here by writ of error * * * and a motion has been made to dismiss the writ. It appears by the record that the judgement was rendered on the 25th day of October, 1843. The writ of error by which the case is brought here was allowed on the 19th day of October, 1848, and the bond also bears date on that day. But the writ of error was not issued until the 4th of November following. It was issued by the clerk of the court in which the judgment was rendered and on the same day, *as appears by endorsement upon it, filed in that office* by the counsel for the plaintiff in error. More than five years from the day of judgment had therefore elapsed *when this writ of error was filed.*"

The act of 1789 c. 20, Section 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. *The writ of error is not brought in the legal meaning of this term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior court to the appellate court,* and the period of limitation prescribed by the act of congress must be calculated accordingly. *The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question.*

"In this case, therefore, five years had elapsed before the writ of error was brought and the limitation of time in the act of congress was a bar to the writ. According to the English practice the defendent in error must avail himself of this defense by plea. * * * But according to the established practice of this court he need not plead it, but may take advantage of it by motion. The forms of proceeding in the English courts of error have never been adopted or followed in this court, and either party, without any formal assignment of errors, or plea, may avail himself of any objection *which appears upon the record itself.* In this case the bar arising from the lapse of time, is *apparent on the record*

and the defendant may take advantage of it by motion to quash or dismiss the writ. * * * The writ must be dismissed upon the ground that it is barred by the limitation of time prescribed by the act of congress." Brooks vs. Norris, 11 How., 204-208.

According to this case the question of the jurisdiction of this court not only turns upon the *filing and endorsement thereof of this writ in the court below but any objection apparent upon the face of the record can be taken advantage of by motion to quash or dismiss the writ.* This case not only decides our motion but *justifies* us in thus bringing the question up by motion.

And this case does not stand alone. It is cited and followed in a long line of cases, federal and state. Mussina vs. Cavazos, 6 Wall., 355, 363; Cummings vs. Jones, 104 U. S., 419: Scarborough vs. Pargoud, 108 U. S., 567 (2 S. C. R. 877); Pollys vs. B. R. Impt. Co., 113 U. S., 81 (5 S. C. R. 369); Credit Co. vs Ry. Co. 128 U. S., 258, (9 S. C. R. 107,); Farrar vs. Churchill, 135 U. S. 609 (10 S. C. R. 771); U. S. vs Baxter, 51 Fed. (C. C. A.) 624; U. P. Ry. Co. vs. C. E. Ry. Co., 54 Fed. (C. C A.), 22; Warner vs. T. & P. Ry. Co., 54 Fed., (C. C. A.), 920, 921, 922; Stevens vs. Clark, 62 Fed. (C. C. A.), 321, Threadgill vs. Platt, 71 Fed., 1; Crippin vs. Livingston, 12 Fla., 638; and Wright vs. Hughes, 2 Green, (Iowa), 142.

If there is safety in the multitude of authorities, we are certainly safe in our contention and position.

What does the term filing mean? Burrill's law dictionary defines it thus:

"Delivering the paper (endorsed with the title of the cause and attorney's name) to the clerk of the court in which the action is pending, who marks it 'FILED,' adding

the date, and deposits it, under the proper head among the papers, or files, in his office."

This is substantially the definition of filing found in all the law and other dictionaries. Some of them like Burrill's, Black's, Webster's International, and the Standard Dictionary, give a double definition.

"To 'file' a paper on the part of a party, is to place it in the official custody of the clerk. To 'file' on the part of the clerk is to endorse upon the paper the date of its reception, and retain it in his office subject to inspection by whomsoever it may concern."

We, of course, maintain that THE ACT OF FILING HATH THESE TWO BRANCHES AND THAT THE FULL AND PROPER DEFINITION OF FILING EMBRACES THEM BOTH. If authority is needed we have it. Foster in his work on federal practice, says;

"No paper is considered filed unless it has the proper endorsement by the clerk." I Foster, Fed. Prac. 598.

"No paper is filed unless it has the proper endorsement of the clerk, merely placing it in the court papers is no filing. A promissionary note or bond upon which suit is brought, though introduced in evidence, is not filed and can be withdrawn. 'Tis not considered '*received and filed*,' nor is it entered in the court calendar." Amy vs. Shelby Co., 1 Flippin, 104 (C. C. 6 C. Aug. 7, 1872.)

"In regard to filing the orders to pay to which the signature of the judge is attached, SUCH PAPERS BELONG TO THE FILES OF THE COURT AND SHOULD BE MARKED 'FILED,' BY THE CLERK FOR IDENTIFICATION." Erwin vs. U. S., 37 Fed. 470, 484.

Almost every case concerning clerk's fees in the United States Courts involves this question and necessitates this interpretation of the definition of the word "filing."

'Tis matter of common knowledge that rules and regulations of the Department of Justice requiring certain papers,

reports and vouchers, to be filed, require them to be marked or endorsed *filed.* If every paper or thing, left in the custody of the clerk, or in the clerk's office, were considered filed whether marked "filed," or entered in the register as "filed," or not, the clerk's responsibilities would be very much enlarged, and persons would be afraid to leave anything at the clerk's office. The bare statement of "such a state of things" shows its absurdity. A clerk frequently receives a paper or document and keeps it to be filed when his fees are paid, and it is generally considered that he has a perfect right to do this.

Even if "depositing in the proper office" were "filing" in English practice, our law and practice have changed that (Brooks vs. Norris, 11 How. 204-208) and our federal courts are governed by their own laws and their own practice. But, if we may judge from the defination of filing a bill in chancery given by Daniel in his work on chancery practice, English practice is very like our own in this respect.

"Bill in chancery—how filed."

"The clerk of records and writs dates it the day that it is brought into his office, numbers it, and receives it into his custody, the bill is then said to be *filed* and of record, but *before this process is completed, it is not of any effect in court,* and persons to be made parties have no right to take copies of it." Dan. Chan. 2nd Am. Ed. 468-9, Star paging 454.

Of course there may be found some loose definitions of filing scattered through the books, but they serve only as exceptions to prove the proper definition of the term.

In Iturbide's Executors vs. United States, 22 Howard, 290, a statute requiring the *filing* of a bond is held to be mandatory.

An order denying a motion for a new trial signed by the

judge *does not become effective until filed of record in the clerk's office.* Danielson vs. Fuel Co., 55 Fed., 49.

The decision of the state courts though not authoritative upon this question in this court, are on the whole, in line with those already given.

The leading case on this subject in this State is Tregambo vs. Comanche M. & M Co., 57 Cal. 501, which gives only the partial definition of filing. It defines filing on the part of the party or attorney only. "In this state a paper is deemed filed when delivered to the clerk and the clerk's fees paid if demanded." We do not dispute this definition as far as it goes. We only claim that it does not cover the ground. Smith vs. Biscailuz, 83 Cal. 539, holds that "It is premature to enter the default of a defendant whose demurrer is on file undisposed of although the demurer has not for want of fees paid been endorsed filed. 'Tis an old rule, and it was the rule of that court, that demurrers *interposed* should be disposed of before the case could be tried on its merits.

In Howell vs. Slauson, 83 Cal. 544, 'tis held that a list endorsed "list No. 1 Received and filed December 5, 1870," was (of course) filed.

In the case of Holman vs. Chevallier, 14 Tex. 339, a state statute allowed and execution to issue on a judgment after the death of the plaintiff, upon an affidavit of death entered of record or filed with the clerk, together with a certificate of appointment of a legal representative of the deceased plaintiff. There is no doubt that the state law had been sufficiently complied with. The presumption in favor of all judgments which cannot be collaterally attacked was also invoked in this case. The case of Turner vs. State, 41 Tex. 549, referred to in a note to a late edition of Texas Reports in connection with the last case, holds that the omission of a

file-mark upon a bail bond would not effect the liability of the obligors on the bond. Of course not.

All the other State Court cases which we have examined, and we have endeavored to examine them all, are all strong in our favor, except prehaps a few that follow some particular provisions of State statutes, and so would not apply to our case. Pfirman vs. Henkel, 1 Bradw. (I 11 App.) 145: Peterson vs. Taplor, 15 Georgia 483 (60 Am. Dec. 705).

Powers vs. State, 87 Ind., 144, 148, arose under a State statute which only required papers to be deposited in the clerk's office, and besides, it was held that the objection to the want of filemark came too late after trial and conviction. The case of Johnson vs. Crawfordsville 11 Ind. 284 arose under a State statute which made a certified copy of articles of incorporation legal evidence, so that the question of filing or filemark cut no figure in the case. Naylor vs. Moody, 2 Blacks (Ind.) 247, held that under a State statute requiring letters testamentary to be recorded, filing them was not a compliance with the statute.

Under a statute requiring an original document, or a copy thereof, to be filed with the pleadings, it was held that the act was complied with when the document was set out in haec verba in the pleadings. (Of course.) "The mere leaving with the clerk not suffieient unless the purpose of so leaving stated and not left to inference." Lamson vs. Falls, 6 Ind., 309. In Engleman vs. State. 2 Ind., 91, a defendant appeared, pleaded to an indictment, entered into a recognizance for his subsequent appearance, applied for and obtained a charge of venue, was tried and convicted, after all which he objected in an appellate conrt that the indictment had not been properly filed. It was held not that the endorsement was not necessary but that the objection came too late.

"Filing signifies more than mere endorsement to that effect, and comprehends entries made by the clerk on the record." Johnson vs. Hodges, 65 Mo., 589.

In Shore vs. Larsen, 22 Wis., 137-8, a mortgage duly received for record having time when received endorsed upon it held (of course), duly filed. In Smith vs. Waggoner, 50 Wis., 155, 160, it is held "the filing and endorsement are the principal things to be done. Entries in the book not essential." See also to same effect Marlet vs. Hinman, 45 N. W., (Wis.) 953.

"Plaintiff cannot contradict clerk's record and show that the certificate was received to be filed and not to be recorded." Chapin vs. Kingsbury, 138 Mass., 194. Recording not compliance with statute requiring "filing." Chapin vs. Kingsbury, 135 Mass., 580. "Clerk's certificate endorsed on instrument is conclusive that it was recorded at the time named therein." Fuller vs. Cunningham, 105 Mass., 442; Tracy vs. Jenks, 15 Pick., 465; Jordan vs. Farnsworth, 15 Gray, 517. Under a statute not requiring endorsement a paper left in the safe at a clerk's house and office held filed. Reed vs. Action, 120 Mass., 130.

Held mortgage not filed for record until instructions given to record, and then, antedating filing to date of actual delivery of paper to officer, of no effect. Deadman, vs. Eagle, 52 Ark., 164: Citing Brown vs. Fassett, 37 Ark., In last case held mortgage not filed though endorsed filed, the words "for record" being erased.

A chattel mortgage was endorsed by a person who had charge of the town clerk's office, "Filed October 20, 1845," and placed among chattel mortgages in the office: Held this was a filing, Bishop vs. Cook, 13 Barb. 326; Dodge vs. Potter, 18 Barb., 193.

"Filing a paper is now understood to consist in placing it in the proper official custody, on the part of the party charged with the duty of filing it, and the making of the appropriate endorsement by the officer." Phillips vs. Beene's Adr., 38 Ala. 248.

A warrant deputizing an under sheriff filed with the clerk need not be endorsed to make it valid. (Of course not.) Haines vs. Lindsay, 4 Ohio, 88.

All pleadings should be endorsed by the clerk when filed but party deemed to have waived his right to object on on that account, after plea, verdict or judgment. Fanning vs. Fly, 2 Coldw. (Tenn.) 486.

"Filing imports more than a mere reception into the custody of the clerk of the Court; his endorsement is necessary. Pinders vs. Yager, 59 Iowa, 468.

Under State statutes curing every conceivable defect in legal papers endorsement would not, of course, be necessary.

Rex vs. Wade, 1 B. & A., 861, gives definition of filing on the part of a party or attorney. Only *quaere* as to whether filing is good without endorsement.

A paper is not filed until it reaches place of final custody. Not when it first comes into the hands of the officer of the court. Garlick vs. Sangster, 9 Bing. 46.

"There is a paper forming a part of the supposed record, which appears to be signed by the judge of the district court as a bill of exceptions. It is, however, devoid of any filing mark indicating that it ever came into the hands or the office of the clerk of that court. It is not authenticated by any sort of certificate of such clerk, or by the seal of the court. The signature of the judge imparts vitality to a bill, and authorizes it to form a part of the record in the cause. When it has become such, it requires the certificate of the clerk of the court, who is the custodian of the records, to properly authenticate it as either the original or a transcript thereof. How is this court to know that any paper is one of the originals filed in the cause in the

court below, unless that fact is certified to by the clerk? We may recognize the signature of a judge appended to a bill by reason of the personal familiarity of one or more of the justices composing this court with such signature, but we are not in a position to conclude that the paper thus seeming to be signed by the proper judge was ever filed or ever became a part of the record, or is in the condition it was in when signed, unless the same is authenticated by the officer whose duty it is to file and preserve the same." Moyer vs. Preston, 44 Pacific Reporter, 850.

But it may be claimed that all the papers involved in this motion were properly endorsed by the clerk of the court below and that he omitted to copy (or have copied) the endorsements into the transcript of the record which was sent up. And in this connection it may be said that he will be presumed to have done his duty.

Our complete answer to this is, that if he properly endorsed those papers, "it doth not appear" in the transcript and it certainly ought so to appear, and the presumption as to official duty, is, to use a common expression, "as long as it is broad," and would cover his duty to incorporate the endorsements into the transcript as well as his duty to make them. Most of the other papers in the cause were properly and regularly filed and we find those file marks in the duly certified transcript as a part of it. Would the clerk in copying or comparing for certification have copied and certified the file marks upon some, and omitted to copy or certify the same if there were any upon others? "A question not to be asked." No; the truth and the fact is that the clerk of the court below was not requested to file these papers before the transcript was made and sent up. We had the records of the lower court searched after the transcript came here and there was no file mark on them then, nor were they entered in the register as "filed." The clerk has no authority to change the file mark on papers filed by him.

Warner vs. T. & P. R. Co., 54 Fed., (C. C. A) 920, 921, and, of course, no authority to file papers which he is not ordered or requested to file. Even if the clerk of the court below could, by a *nunc pro tunc* order of court file all the other papers which counsel have neglected to have filed, which, under the authority of the Credit Co. vs. R. Co. *supra*, we most emphatically deny; yet, this procedure could not apply or be applied to the original citation and writ of error which came up with the transcript and are beyond the control of the clerk of the lower court or even of the lower court itself. These, at least, are secure. We stand upon our record. The transcript of the record, like every record, and especially these original papers, imports verity.

What says the Supreme Court, Chief Justice Taney speaking for the court.

"Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record as certified and returned by the clerk of the Circuit Court can be received here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court." Hudgins vs. Kemp, 18 How. 530, 534.

The clerk is not to blame for not doing what he was not requested to do, nor for not doing, whether requested or not what it was counsel's duty to do. "The fact that the clerk of the Circuit court in preparing transcripts on appeal to this court, labored under a mistake as to the time within which the transcripts were required to be filed is not a valid excuse for failure to file them within the time prescribed by the established rules. Richardson vs. Green, 136 U. S., 104 (9 S. C. R. 443). And this court cannot in support of its jurisdiction rely upon any recital in the petition for writ, order allowing writ, or even in the clerk's certificate, if such

recital is unsupported by the original writ. The clerk cannot make a record of what is not a record. That any matters are certified by the clerk does not make them part of the record Reed vs. Marsh, 13 Pet. 153; Fisher vs. Crockrell, 5 Pet., 248, 254. And if the clerk cannot by certifying it make that of record which is not, certainly counsel cannot patch up a record by recitals in draft orders, bonds or other papers. A recital is a citation, even, that an allowance of an appeal was obtained at a certain time, does not prove the fact. Edmondson vs. Bloomshire, 7 Wall 306, 313. So in Sage vs. R. Co., 6 Otto, 712-16, the Supreme Court says: "It is true that the bond accepted in this case, recites an allowance of an appeal in open court, *but this is mere surplusage, etc.*" "The return of process contained in the record on appeal must control, etc., *no presumption can be indulged that there was some other and different service of process* made from that which appears in the record." Lonkey vs. Keys S. M. Co., S. C of Nevada, and cases cited (17 L. R. A. 351). Presumptions cannot controvert facts and there are no presumptions in favor of the jurisdiction of the United States courts. "An unnecessary statement in the Marshal's return is not conclusive of the court's jurisdiction." The Lindrup, 70 Fed. 718.

The fact that neither clerk nor counsel deemed it necessary to file certain papers, or KNEW HOW *to file them properly*, would be no excuse for their not being properly filed.

In the State of Florida the C. H. Phosphate Company, 70 Fed. (C. C. A.) 883, 885, already cited, the court says:

"It is claimed that this failure to file the order of enlargement was a neglect of the clerk of the lower court for which the appellant is not responsible. We cannot assent to this. * * * It was not the business of the clerk of the Circuit

Court, to obtain such an order, file it in his office, or transmit i to the Court, but it was the duty of the appellant not only to procure the order, but to see to the proper lodgement of the same."

See also Warner vs. T. &. P. R. Co., 54 Fed. 920, already cited.

"It is no part of the clerk's duty as clerk to procure the allowance of writs of error and the appoval of bonds for appeals for writs of error. This is the office of parties, or of their attorneys and solicitors. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary endosement on the writ of error. He relied on the clerk to do for him what the clerk was under no official obligation to do. He complained with no very good grace of the manner in which the clerk performed a purely voluntary service for his accomodation and at his request, etc."

In the case at bar there does not appear to have been any such request, even made of the clerk.

II.

THE CIRCUIT COURT OF APPEALS COMMITTED NO ERROR IN DISMISSING THE WRIT OF ERROR, AS THERE WAS NO EVIDENCE THAT THE WRIT HAD BEEN FILED.

It is admitted by the attorneys for defendant in error that writ of error must be filed or lodged with the court wherein the case was tried.

Then the only question open for discussion is: Was there evidence of such filing in the record before the circuit court of appeals? We say there was none.

The law provides that the original writ of error shall be annexed to the record and returned to the circuit court of appeals. It is admitted that writ of error had nothing upon it to show that it had been filed in the lower court

It is also admitted by plaintiff in error that the indorsement of the filing of the writ on such writ would be the best evidence. This is wholly wanting. What other evidence is there that it was ever filed or even lodged with the lower court? We say, none.

Plaintiff in error claims that the filing of the writ is shown in the following ways:

1 The original writ was attached to the record that was transmitted to the circuit court of appeals, and the fact that it was so transmitted is evidence that it was filed by the parties in the lower court. Judge Gilbert in his dissenting opinion laid much stress on this fact.

We strenuously urge that this is not evidence of such a fact. There might be something in the contention if the writ had the signature of Mr. McKenney and the seal of this court, and had been allowed by one of the Justices of this Court, because in such a case it would have been necessary for some party (and it might be presumed to be the plaintiff in error) had taken the writ from this city to Seattle and lodged or filed it with the clerk of the lower court at Seattle. But it was signed by the same clerk who transmitted it to the circuit court of appeals. He surely had it in his posession when he signed the writ. It was in his possession when the lower court allowed it.

It will not be contended that up to this point the writ was filed although it was in exactly the condition in which it was forwarded to the circuit court of appeals. No one will contend that if forwarded in that condition and prior to the delivery of the same to the attorneys and the filing of the same by them, the appellate court would have acquired jurisdiction, because the one essential thing was wanting,

viz. the filing and even the lodging of the writ by the attorneys after the same had been issued. Yet, as we have said it was in the same condition when forwarded to the circuit court of appeals as it was when issued by the clerk and remained in his hands ready for delivery.

The only presumption that can be indulged in (and we doubt even this) is that at some time after the writ was issued it was in the hands of the clerk of the lower court; but we have shown that it was in his hands when issued. At that moment it was ready for delivery to the attorneys for the plaintiff in error to be filed by them; and when filed, jurisdiction would attach. No other party than the plaintiff in error could file this writ. And if that was neglected by it the jurisdiction of the appellate court would never att ch. It has been held frequently by this court that where the record showed the issuance of the writ during the time within which the writ might be sued out, yet if the parties neglected to file it within the statutory time, jurisdiction would never attach. The following authorities show this to be the well established practice in this court.

In the Credit Company vs. Railway Company 128 U. S. 258, record on appeal shows that the petition for appeal, the allowance, citatation and bond were *endorsed filed by the clerk of the court five days after* the time within which an appeal could be taken had expired, and the appeal was accordingly dismissed, although argued and submitted to the appellate court upon its merits without objection or making a motion to dismiss and so far as the delay of five days could be waived by the parties, it was waived, and although an attempt was made to cure this defect of jurisdiction by an order of court *nunc pro tunc*. As to which last effort the court says:

"When the time for taking an appeal" (or suing out a

writ of error, see R. S. section 1012, and even the former portion of this same decision) "has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken" (or a writ of error sued out) "would be a dead letter. The appeal must be dismissed."

In the case of Farrar vs. Churchill, 137 U. S. 609, a final decree was rendered November 5, 1885. On October 31 1887, certain defendants presented a petition for a cross-appeal to a justice of the Supreme Court and obtained an allowance thereof, an appeal bond being approved and a citation issued on that day. This petition was filed in the circuit court on the 7th day of November, 1887. By an endorsement upon the citation service of the same was accepted and an appearance of appelle entered on the 5th day of November, 1887. And yet, the Supreme Court dismissed the crossappeals.

"Crossappeals must be prosecuted like other appeals. * * * And so when a crossappeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the crossappeal under the statute. As in this case the petition, order and bond *were not filed in the Circuit Court* until after two years had elapsed from the entry of the decree the crossappeal must be dismissed."

So we claim that the only legitimate presumption that may be indulged in from the fact that the writ accompanied the record to the circuit court of appeals is that the writ was issued by the clerk of the lower court. The whole record bears out this presumption and this alone.

If we examine the law register it will be observed that every other paper was marked filed and a charge made for the filing of the same. It will be observed on page 435 that the law register of the lower court recites merely the issuance of the writ and the citation, not that they were filed. See record, page 435.

It also shows that no charge was made for filing the same although charges were made for the filing of all other papers. The original writ and citation bear no file marks upon them. All other papers filed in the cause are properly marked filed. So if any presumption may be drawn at all it is that the writ of error was never filed by the lower court, but merely issued by it and transmitted without filing. Again it is a presumption that applies in all court procedure that the clerk as well as all other officers of the court will do his duty. It was the clerk's duty if the writ was filed by him, to mark it so, and preserve evidence of this fact in the record.

The plaintiff in error further contends that the affidavit of the clerk of the lower court, the recital in the citation in the writ had been filed, and also the returns of the clerk that the fees for the transcribing the record had been paid are all evidence of the fact that writ had been filed.

If the record before the circuit court of appeals was incomplete (and it is admitted by counsel that it was, in not affirmatively showing the filing of the writ), there was one way, and one way only, to supply the omission, and that was by suggesting a diminution of the record and applying for a writ of certiorari to complete it. By obtaining a proper return to such writ, such omitted facts would then become a part of the record.

It would be a strange, yes, dangerous, rule that would allow parties to supply records by affidavits. Take this case, for example. The matter of the dismissal came on for hearing on the 4th day of May, 1896. On that day, without any notice to defendant in error, petitioner filed the affidavit of Mr. Hopkins, the clerk; Mr. Strudwick, one of the attorneys of record, and Mr. Quilter, deputy marshal, to com-

plete and supply facts not otherwise appearing of record. (See Record, pp. 414, 418, and 420.) It is not by the record proper, but upon the affidavits of these parties, especially that of Mr. Hopkins, that the petitioner relied to show that the writ of error was in fact filed. To state these facts is really all the argument needed to show that such extraneous matter must be disregarded.

If one fact can be supplied in such a manner, then any other matter can be brought into the record in the same way. Supposing a party neglected to show the necessary jurisdictional fact of diversity of citizenship, could such party supply it in the appellate court by affidavit?

Again supposing the record failed to show that a judgment had been entered against plaintiff in error, or the record failed to show proper exceptions had been taken to alledged errors in the charge on which plaintiff in error was relying for reversal could these be supplied by affidavits? The only way to bring such matters into the record would be to suggest a diminution of the record, obtain a writ of certiorari, and in that manner bring any ommitted part of the record of the lower court into the record of the appellate court.

We are not without authority on this proposition. The same thing has been attempted before in this Court, and such matters not properly in the record have always been disregarded. On this question Chief Justice Taney, speaking for the Court, says:

"Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record as certified and returned by the clerk of the circuit court can be received here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court." (Hudgins vs. Kemp, 18 How., 530, 534.)

"The clerk is not to blame for not doing what he was not requested to do, nor for not doing, whether requested or not, what it was counsel's duty to do.

" 'The fact that the clerk of the circuit court in preparing transcripts on appeal to this Court labored under a mistake as to the time within which the transcripts were required to be filed is not a valid excuse for a failure to file them within the time prescribed by the established rules.' " (Richardson vs. Green, 130 U. S., 104; 9 S. C. R., 443.)

"And this Court cannot in support of its jurisdiction rely upon any recital in the petition for writ, order allowing writ, or even in the clerk's certificate, if such recital is unsupported by the original writ. The clerk cannot make a record of what is not a record. That any matters are certified by the clerk does not make them part of the record. (Reed vs. Marsh, 13 Pet., 153; Fisher vs. Cockrell, 5 Pet., 248, 254), and if the clerk cannot by certifying it make that of record which is not, certainly counsel cannot patch up a record by recitals in draft orders, bonds, or other papers. A recital in a citation, even that an allowance of an appeal was obtained at a certain time, does not prove the fact. (Edmonson vs., Bloomshire, 7 Wall., 306, 313.)

"So in Sage vs. R. Co., 6 Otto, 712–'16, the Supreme Court says:

" 'It is true that the bond accepted in this case recites an allowance of an appeal in open court, but this is mere surplusage, etc.' "The return of process contained in the record on appeal must control, etc. No presumption can be indulged that there was some other and different service of process made from that which appears in the record.' (Lonkey vs. Keys S. M. Co., S. C. of Nevada, and cases cited, 17 L. R. A., 351.)

"Presumption cannot controvert facts, and there are no presumptions in favor of the jurisdiction of the United States courts.

" 'An unnecessary statement in the marshal's return is not conclusive of the court's jurisdiction.' "

The Lindthrup, 70 Fed., 718.

All the rules of appeal sustain our position and the above

authorities. We will cite the text in the American and English Encyclopaedia of Pleading and Practice on several propositions which clearly state the rules, and they are so well recognized that they need no citation of authorities to support them, but the authorities are cited under each which fully support the rules.

"Duty of Appellant in Making Transcript—(1) In General. As the appellee cannot transcribe the record, it is the duty of the appellant to cause the transcript to be made and filed. He must see that it is correct, complete, properly arranged as the rules of the court require, and properly authenticated. Were guilty of laches in its examination, he cannot plead surprise or inadvertance as an excuse in the appellate court."

American and English Encyclopaedia of Pleading and Practice, Vol. 3, page 292—3, and cases cited.

"Impeachment of Record — The Record Imports Verity. A properly authenticated transcript of the proceedings in the trial court imports absolute verity, and cannot be contradicted by affidavits nor in any other manner. As all appeals are based on trial court records, the parties in appeal are conclusively bound thereby. The appellate court cannot, therefore, look beyond the record for grounds upon which to determine the case."

Ibid. pp. 296—7

"Evidence Dehors the Record. — New or extrinsic evidence will not generally be received on appeal to add to or detract from the transcript, either at law or in equity. Additions or omissions therein cannot be expunged or supplied by an affidavit of a party, or his counsel, or by statements in the brief or argument."

Ibid. p. 298, and cases cited.

"Amendments of Record. — (1) Of Original Record.— Where the transcript on appeal is filed it passes into the sole jurisdiction of the appellate court. But the original record of which the transcript is a copy remains in the jurisdiction of the trial court. The appellate court has accordingly no power to amend the original record. But all corrections therein must be first made by an appropriate proceeding in the trial court, and afterwards brought up before the appellate court by certiorari."

Ibid. pp. 301—2, and cases cited.

Amendment of Record.—But the original records are not removed by an appeal. And the trial court retains jurisdiction to so amend them as to express the actual events during the trial of the cause, even after an appeal has been taken from a final judgment therein.

Ibid. p. 331, and cases cited.

"Lost Papers.—Lost records in the cause cannot be supplied in the appellate court by sworn copy, or by affidavits. An appropriate proceeding must be taken in the trial court to prove and substitute copies of such lost papers. They can be made part of the original transcript by order of the appellate court alone."

Ibid. pp. 303 - 4, and cases cited.

"Omissions.—Portions of the record involving no questions should be ommitted; but every record matter essential to a full understanding and proper decision of the case must be shown in substance fairly and intelligibly by the abstract."

Ibid p. 314, and cases cited.

Certificates.—The certificate of the clerk below, or a certificate or an affidavit of the judge, cannot be considered in contradiction, amendment, or addition to the contract."

Ibid. p. 316, and cases cited.

"By Affiadvit.—A return of record cannot be impeached by affidavits of a party, counsel, or the trial court clerk."

Ibid. p. 300, and cases cited.

It is also too well settled to need citation of authorities that all jurisdictional facts must appear affirmatively of record. They cannot be supplied by inference or presumption.

It is also true that a court will not indulge in a presumption of any character in regard to any record in the lower court which does not affirmatively appear in the transcript or record. For instance a court will not presume that a judgment was entered either for or against appellant. It will not presume the verdict of a jury was returned either in favor of or against the appellant.

As we have suggested above, a writ of certiorari was the only way to complete the record in the circuit court of appeals

or bring into the record the omitted evidence if any of the filing of the writ. This the attorneys for appellants must do at the first term of court after the entry of case in accordance with rule 14 of the Supreme Court of the United States, and also by rule 18 of the Circuit Court of Appeals for the ninth circuit, which rule is identical with rule 14 of the Supreme Court. This the plaintiff in error wholly failed to do, but on the contrary submitted his case on the record and the case was decided as submitted by him so that he has effectually waived his right to obtain a writ of certiorari to complete the record, it is now nearly two years since the motion was made by defendant in error and attention called to the defect in the record. It is the rule in all courts so far as we are familiar with them, and has always been, that the appellant must move promptly for a writ of cetiorari for a completion of the record or he will be held to have waived his right to such a writ.

This being the well established practice, it comes with very poor grace on the part of petitioner to complain of the clerk in not giving plaintiff in error a perfect record. It had it within its power and it was the duty of the attorneys to get a perfect record if one existed. It has no one to blame but itself if it failed in getting the whole of the record before the appellate court. The very fact that the clerk was willing to make affidavits, etc. (a purely voluntary act, wholly outside of his official duties), to be used for the purpose of supplying defective records, shows he was not in any sense acting in bad faith or refusing to give plaintiff in error such records as it desired.

In the State of Florida the C. H. Phosphate Company, 70 Fed. (C. C. A.), 883, 885, the Court uses language quite appropriate for this case, wherein it says:

"It is claimed that this failure to file the order of enlargement was neglect of the clerk of the lower court, for which the appellant is not responsible. We cannot assent to this * * * It was not the business of the clerk of the

circuit court to obtain such an order, file it in his office, or transmit it to the court, but it was the duty of the appellant not only to procure the order, but to see to the proper lodgment of the same."

See also Warner vs. T. & P. R. Co. (54 Fed., 920):

"It is no part of the clerk's duty as clerk to procure the allowance of writs of error and the approval of bonds for appeals of writs of error. This is the office of parties of their attorneys and solicitors. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary indorsement on the writ of error. He relied on the clerk to do for him what the clerk was under no official obligation to do."

III.

EVEN IF THE AFFIDAVITS ABOVE MENTIONED COULD BE CONSIDERED A PART OF THE RECORD, THEY DO NOT SHOW THAT THE WRIT WAS FILED.

Even if the affidavits above referred to are considered a part of the record, yet considering the record together with the affidavits they fail to show the filing of the writ, but on the contrary affirmatively show that the writ was not filed.

On this proposition we simply refer this Court to the well considered decision of the circuit court of appeals, found on pages 432—446 of the record.

IV.

IF THE COURT SHOULD BE OF THE OPINION THAT THERE WAS EVIDENCE OF THE FILING OF THE WRIT, YET THERE IS NO EVIDENCE SHOWING WHEN IT WAS FILED, OR ESPECIALLY THAT IT WAS FILED PRIOR TO THE ISSUANCE OF THE CITATION. IF FILED SUBSEQUENT TO THE ISSUANCE OF THE CITATION THEN THE CITATION IS OF NO EFFECT OR FORCE, AND THE CASE WAS PROPERLY DISMISSED.

It must be conceded that a citation issued and served prior to the issuance and filing of a writ of error is a nul-

lity. So, if the writ of error in this case was filed after the issuance and service of the citation (and surely there is no record showing that it was filed before) such citation was useless and void and could be disregarded as it was by the defendant in error appearing especially, as she did, and moving to dismiss.

Before filing the motion counsel for defendant in error examined the record both in the lower court and circuit court of appeals to see if the writ of errror had been filed. He found no record of such writ having been filed, and everything in the record indicated that none had ever been filed, much less did the date of filing appear. Said search clearly proved to the defendant in error that the citation was improperly issued. So if this court should be of the opinion that the fact of the original writ of error was returned to the circuit court of appeals was some evidence that the writ of error had previously been filed with the clerk of the lower court, yet there is nothing in the record to show the date of the filing or even the lodgment of such writ. Nor can there be any presumption that it was filed or lodged prior to the date the record was transmitted by the clerk of the lower court to the circuit court of appeals. So that neither the circuit court of appeals nor this court can say that the citation was not issued prematurely; and, if issued prematurely, then it was a right that the defendant in error had to have the writ dismissed on the ground set forth in the motion "that no proper legal citation on said writ of error was issued or served." True it is contended that the affidavit of the clerk shows this fact, but we have already shown that the affidavit of the clerk cannot be considered as a part of the record in the case.

Brief on the Merits.

The defendant in error not waiving its motion heretofore made to dismiss this cause for want of jurisdiction, but on the contrary maintaining that her motion should prevail, files and submits this her brief upon the merits.

STATEMENT OF THE CASE.

Defendant in error will make the argument in its brief on the theory that appellant will make the same statements and arguments made in its brief before the circuit court of appeals We do this because plaintiff in error has not seen fit to give us a copy of its brief in this court.

We desire to make a few corrections of the statement made by plaintiff in error. There is absolutely no proof that the general agent in San Francisco sent any notice to Mr. Phinney. The agent says he thinks he sent him a notice. There is no claim that the notice provided by statute was mailed. The company in open court stated to both counsel and court that it did not allege the service of either the statutory notice or any other notice, and was not claiming and

would not claim the benefit of having served any notice. Record p. 190-2. The evidence of notice came out in the testimony of Mr. Stinson when plaintiff in error was offering evidence under the allegations of its pleadings that the policy had been recinded and surrendered. As the plaintiff in error had agreed in open court never to claim the benefit of having served any notice the evidence was rendered were objectionable. It is true that Mr. Stinson testified that about ten days before the premium became due Mr. Phinney called at his office to arrange for the payment of the premium, and asked Mr. Stinson to take his 60 or 90 day note. But Mr. Stinson in almost the same breath testified to other facts of considerable importance in connection therewith that plaintiff in error overlooked in its statement. He destified that, after he claimed the premium was due, and prior to the time Mr. Phinney tendered the premium he had several conversations (on cross examination so many he could not remember the number. Record p. 267.) with Mr. Phinney, each time Mr. Phinney endeavoring to get him to take his note for the second year's premium, each time he telling Mr. Phinney to get the money. Finally about 30 days after it was due and after a number of like conversations Mr. Phinney obtained the money and tendered the premium and the agent declined to receive it on the ground that Mr. Phinney was in ill health. No evidence was offered to show that during this interim Mr. Phinney's health had become impaired. The statement made by counsel by plaintiff in error that Mr. Phinney said he could not pay the premium, and that he made no tender of the premium is unwarranted by their evidence. The following are two letters written at the time this transaction occurred:

"SEATTLE, Washington, Nov. 26, 1891.

"*A. B. Forbes, Esq., Gen'l Agt.*

"DEAR SIR: In compliance with your request, I regret having to return the undernoted renewal receipts.

"September.

"51342 Janey * * *

"422198 Phinney. (Offered to pay but in ill health)

"Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipt asked for) will be reported in next acct.

"Yours very truly,

"F. L. STINSON."

"SEATTLE, Washington, Dec. 10, 1891.

"*A B. Forbes, Esq., Gen'l Agt.*,

"DEAR SIR: Your wire of the 9th inst. reading. 'If tendered decline acceptance September premium, No. 422, 198, Phinney,' duly received. "This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.

"Yours very truly,

"F. L. STINSON."

Record 187 and 188.

The agent says, "It was tendered and I refused it" These are the words of an active business man, made at the time the transaction occurred. That the company, at the time of the trial, (after Mr. Phiney was dead and gone), should undertake to show by this same party that there was no legal tender, does not militate against the record made at the time. It is quite apparent that at the time he considered it a good tender.

There is an attempt to show that Mrs. Phinney, the executrix, considered and treated the policy as forfeited.

The evidence does not bear this assertion out. At the time of the death of Mr. Phinney, Mrs. Phinney was taken seriously ill, and for nine months her life was despaired of by her friends. All matters in connection with her estate was left to her agents and attorney. This policy was not among the papers found among Mr. Phinney's effects. Mrs. Phinney told her attorney, Mr. Burleigh, that there was another policy of $100,000, but the policy was not found, and the matter remained in that condition until she was able to attend to business nine months later. As soon as she was able to attend to her trust the matter was at once taken up and prosecuted. Her evidence is as follows:

"Q. You say that Mr. Phinney never told you this policy was forfeited? A. No.

"Q. Did he ever tell you it was alive? A. Yes.

"Q. How many times did he tell you it was alive?

"A. I could not tell you just how many times, but a number of times.

"Q. How long prior to his death did he mention this policy as being one of his policies of insurance that was in force? A. Not more than two weeks.

"Q. Did he give you any directions as to the use of the insurance you should collect? A. Yes, sir.

"Q. Mention this policy among them? A. Yes, sir.

"Q. You say you did have several conversations with Mr. Burleigh about this?

"A. Well, I don't know, several. I know I have talked with Mr. Burleigh.

"Q. Did you talk to others about it? A. No.

"Q State the condition of your health, Mrs. Phinney, immediately after the death of your husband. * * *

"A. The first year after Mr. Phinney's death I was seriously ill.

"Q. Were you able to attend to business at all during that time? No, I was not.

"Q. These policies were collected by your agent, were they not? A. Yes, sir.

"Q. The business matters were all turned over to other parties? A. All done through other parties.

"Q. Who prepared this letter, Mrs. Phinney, that you mailed to New York?

"Objected to by counsel for defendant as immaterial.

"Objection sustained."

Record, page 237.

The mere fact that Mr. Burleigh prepared a petition stating that the personal property was only $50,000.00, before he had found the large policy, before he knew whether the policy was payable to Mrs. Phinney or the estate, and before he had been able to ascertain the facts in the case does not militate against her evidence in the least. Nor does the fact that a letter by another agent stating that she was unaware of the existence of the policy, which in her condition she signed. The fact remains that as soon as she was able in the least to attend to business this claim was made and enforced.

There was much evidence going to show that the statement made by Mr. Phinney in life that he had paid the premiums in advance, part in money and part in property, was true. As above noticed he spoke to Mrs. Phinney of this policy a few weeks before he died as one of the policies in force. The soliciting agent testified as to the payment of the first premium. He rebated 40 per cent. of $3770.

For the balance he took part cash, part in property, and something over $800 in notes running from sixty days to nine months at a small rate of interest. This fully accounts for the first year's premium entirely outside of what we will now relate. About the time this application was made two mortgages of this soliciting agent were coming due on which the soliciting agent still owed Mr. Phinney over $3400. According to plaintiff in error's amended answer, par. II, p. 33, record, the policy was delivered Nov. I, 1890. On this very day both of these mortgages were satisfied in full by Mr. Phinney in favor of the agent. They had been due for about a month, (and we claim was awaiting the return of the policy) and was satisfied the same day the agent delivered the policy, and as a part consideration of the second year's advance premiums on the policy. The soliciting agent on the stand says he paid the mortgages in cash. He also says he rebated to Mr. Phinney his commission. It would be a strange business transaction for this agent to take Mr. Phinney's notes for $800.00 running from sixty days to nine months, take in further payment outside real estate of little value and at the same time he pay Mr. Phinney over $3,400 in cash, and further be compelled at once to pay the company the $800, which Mr. Phinney's notes represented, as well as the value of the property, amounting to something like $1,000. We claim and believe that the satisfaction of these two $3.400 mortgages were in payment of the second premium. The same soliciting agent told Mr. Jones the smaller one was in payment of a premium. Record, p. 306–7. We are indebted to our adversaries for what evidence was brought out in this line, (the declaration of Mr. Phinney,) as none of it was competent until they opened the door. We did undertake to show another fact which plaintiff in error very strenuously objected to, and the objection

was sustained, and that was that agent was very heavily indebted to the company for premiums received and for which he never accounted to the company. Record p. 279. We do not claim that the company other than its agents received the premium. We believe fully that the agent returned to the company the second year's receipt unpaid, and always led it to believe but one year's premium was paid. There being no direct relation between Mr. Phinney and the company it would be an easy matter to mislead both.

The lower court took the view that no sufficient evidence of the second year's premium was offered. And we only offer the above in support of Mrs Phinney's evidence that Mr. Phinney told her the policy was alive and that both Mr. and Mrs. Phinney so regarded it. In our discussion of this case we will discuss it on the theory that but one year's premium was paid. We need nothing better to support our case.

ARGUMENT.

PART I.

Specifications of Errors, I, II, III, IV, V, VII, XXII. XVIII and XXVI.

THE STATUTE OF NEW YORK WAS A PART OF MR. PHINNEY'S CONTRACT OF INSURANCE.

Plaintiff in Errors specification of errors 1, 2, 3, 4, 5, 7, 22, 23 and 26 are based upon the refusal of the Court to give several instructions to the effect that the statute of New York was not a part of the contract of insurance on Mr. Phinney's life. We contend that this is the only question of merit on this appeal. When this question is answered the rights of the parties on this appeal are fully deter-

mined. Defendant in error maintains this question must be answered in the affirmative for these reasons:

1. Contract was to be wholly performed in New York, hence New York was the place of contract.

2. The legislature of New York intended to deprive all insurance companies chartered by the State of New York of the power to forfeit policies of insurance except in the manner pointed out by the statute, no matter whether the contract was made outside or inside the State of New York. This intention is shown in two ways:—

a. The Court of Appeals of New York has decided that such was the meaning of the act.

b. The language of the act in the light of all the rules of law governing the powers of corporations is susceptible of no other construction.

The contract was to be performed in New York hence New York was the place of contract.

The application for the policy of insurance was made to the company at its home office in New York. The policy was issued in New York upon the receipt of the premium, of which it acknowledges the receipt; the premiums were all payable in New York. The proofs of death were to be delivered at the Home Office of the company in the city of New York. The policy when it matured was payable in the City of New York. The policy was to be forfeited if at all by the non-payment of a premium at the home office in New York. In other words New York was the place of performance in every particular. If any default occcured, it occurred in New York. If the policy was ever forfeited it was forfeited in New York. This shows clearly that the parties intended that the laws of New York should govern

as to the liabilities of the parties and be the place of contract. Especially is this true of defendant in error. It prepared the policy, all these provisions were in the printed form of the policy. Again a clause in the printed form of the policy expressly waived the requirements of the service of the statutory, notice. What statute did it refer to if not this New York statute. It could not refer to one in Washington because there was none to waive.

The provision relative to waiving service of the statutory notice could only refer to the statute of New York This statute must have been considered applicable otherwise what purpose could the company have had in inserting a waiver in the policy. If we stop to consider that this policy was prepared by the company, and we may presume by those skilled in the law relative to such contract it is impossible to come to any other conclusion that it was intended to bring the policy within the protection of the New York laws, and have its liability measured by such laws, at least it used language most appropriate to express such intent, and exclude every other legal construction. It cannot complain if the court so interpret the contract which it prepared presumably in its own interest.

On the foregoing facts we think the law is well settled, and we will content ourselves by quoting alone from authorities.

This proposition was argued at length by both parties in the court below on the assurance by both parties to the Court that it was the controlling proposition in the case. After a careful consideration of the question, the presiding Judge, the Hon. C. H. Hanford, rendered a very full and able opinion which is published in full in the 67 Fed. Rep. p. 493.

The decision of Judge Hanford above referred to as the place of contract, is fully sustained in a very recent decision of this court in the case London Assurance v. Companhia De Moagens De Barreiro. In this case there was not nearly so much in the contract to show the intent of the parties as to the place of the contract as there is in the one we are now presenting

"Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English Company. It made the contract in Philadelphia, by its agents, and that contract, by its terms, was to be performed in England. The parties to it understood and agreed that, in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London, and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the usages of Loyds, but subject to the conditions of the policy and the contract of insurance.

"Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation."

Mr. Justice Peckham after reviewing other cases sustaining the doctrine announced, closes the opinion relative to this feature of the case in the following language.

"This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. See Liverpool & G. W. Steam Co. V. Phoenix Ins. Co., 129 U. S. 397, 446, 453, 9 Sup. Ct. 469."

London Assurance v. Compahia de Moagens De Barreire. 167 U. S. 149.

Mr. Justice Harlan in a case reported in the 142 U. S., uses this language:

"We have seen that the bonds in suit we e redeemable

on the first day of January. 1866, and not before without the consent of the holder, and were payable in pounds sterling with interest at the rate of five per cent. per annum from date, the interest to be paid semi-annually on named days, on presenting the proper coupons for the same at the house or Palmer, Mackillop, Dent & Co., London, where the principal will also be redeemed on the surrender of this certificate.' The contract, therefore, was one in which all parts was to be performed in England. Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate of seven per cent.; fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in view of the parties when the contract was executed. For as said by Chief Justice Marshall in Wayman vs. Southard, 10 Wheat., I on P. 48 it is a principle universally recognized, that in every forum a contract is governed by the law with a view to which it was made.' And by Lord Mansfield in Robinson vs. Bland, 2 Burrow, 1077, 1078, 'the parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as a rule by which it is to be governed. Now here the payment is to be in England; it is in English security, and so intended by the parties.'

Refering to these and many other cases, this Court, speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard vs. Norton, 106 U. S., 124, 136, that the law upon which the nature, interpretation and validity of a contract depended, was that which the parties, either expressly or presumptively incorporated into it as constituting its obligations. This doctrine was reaffirmed in Liverpool, etc., Steam Co. vs. Phoenix Ins. Co., 129 U. S., 397, 458, where it was said that, according to the great preponderance if not the uniform concurrence of authority, the general rule was, 'that the nature of the obligation and the interpretation of the contract are to be governed by the law of the place where

it is made, unless the parties at time of m king it have some other law in view."

Coghlan vs. Sovth Carliona Raliroad Co., 142 U. S., p. 101 on p. 109.

In another case the Supreme Court of the United States was called upon to pass upon the above question of law on a state of facts almost identical with the facts of this case. Mr. and Mrs. Hume were living in the City of Washington, District of Columbia, when they made application to the Connecticut Insurance Company of Hartford, Conn., for a policy of insurance and the question came squarely before the Court whether the law of Connecticut or the laws of the District of Columbia should prevail in governing the rights between Mrs. Hume, the beneficiary, and the creditors of the deceased husband. The Court in part says.

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

"And if this be so as between Hume and the Connecticut companies, then he could not have, at any time, disposed of these policies without the consent of the beneficiary nor is there anything to the contrary in the statutes or general public policy of the District of Columbia."

Washington Central Bank vs. Hume, 128 U. S., 195 on pages 197 and 206.

The Supreme Court of the State of Washington described this point in cases where this plaintiff in error was one of the parties to the suit. In those cases, as in this, this plaintiff in error made the same contention as it now makes in this Court. In one case they contended that the contract was a Pennsylvania contract, in the other, that it was an Ohio con-

tract. In the first case the clause "stipulating that the contract was to be construed according to the laws of New York" was in the printed part of the policy, in the other it was in the application. In the case which the company claimed that the policy was an Ohio contract, the provision was the same as in this case verbatim, and likewise was in the application. The same blank prined form was used in the latter case as in this, and exactly the same argument was urged. In deciding the question the Supreme Court uses the following language:

"From which it clearly appears that it was the intent of the parties to locate the place of its execution in the State of New York. Especially does this appear to have been the intention of the defendant. The provision above quoted appears as part of the printed form of the policy issued by the company. It could have been inserted therein only after full consideration, and its insertion could have had but one object, and that was to bring the policy as fully within the laws of the State of New York as though it had been actually executed and delivered therein. This was done for the benefit of the company, and it must abide the results flowing therefrom. In our opinion sufficient appears upon the face of the policy to require us to construe it as though it had been actually executed and delivered in the State of New York. It must follow that the statute in question must be given force in determining rights founded thereon."

Griesmer vs. The Mutual Life Ins. Co. 10 Wash. p. 202 on p. 208.

At the same time the Supreme Court of Washington handed down another decision as follows:

"The only substantial difference between this case and No. 1507, just decided, (the above case,) is that the clause set out and construed in that case was not in the policy upon which the action was brought There was, however, in the application upon which it was issued a provision that, 'This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and

the laws of the State of New York.'" (Just the same language as that contained in Mr. Phinney's policy); "and, in our opinion, this was sufficient to locate the contract in in that state, and require that rights thereunder should be determined by its laws."

"Hence, for the reasons stated in the opinion in the foregoing case, the judgment rendered in this must be affirmed."

Ella W. Griesemer, admix. vs. Mutual Life Ins. Co., 10 Wash. 211 on p. 212.

The Supreme Court of Georgia has recently supported this view of the case. The syllabus is written by the Court and is as follows:

"Where, in a policy of insurance issued by an insurance company of the State of Massachusetts, it was stipulated as follows: 'No suit shall be brought under this contract, unless commenced within one year from the termination of the of the member to whom it is issued, it being an express condition hereof that all rights of action hereunder are limited to said period of one year. It is further expressly agreed that the place of contract is the home office of the association, in the City of Boston, and this contract will be governed by, and construed, only according to, the laws of the State of Massachusetts and where a law of the State of Massachusetts (Supp. Pub. St. Mass. 1882-88, p. 517, sec. 26), which was of force at the time the policy was issued, provided with reference to insurance companies of that state as follows: 'No such company shall make any stipulation in its insurance contracts concerning the Court or jurisdiction wherein any suit thereon may be brought, nor shall limit the time within which such suit may be commenced to less than two years after the cause of action accrues, and any such condition or stipulation shall be void,' held, that the stipulation in the policy limiting the time within which suit may be commenced thereon to one year from the termination of the life of the the member to whom it is issued is void, and suit may be brought thereon at any time within the period allowed by the statute of limitation."

Mass. Ben. Life Ass'n vs. Hale, 23 S. E. 849.

The California Supreme Court had the same question before it on exactly similar state of facts and held this same

statute of New York to be a part of contract of insurance issued by the New York Life Insurance Company upon a resident and citizen of the State of California. He made an application in California to a soliciting agent, as Mr. Phinney did in Seattle, both applications were forwarded to the General Agency at San Francisco, who forwarded the applications to New York, Both applications contained a like provision stating that the laws of New York should govern and control the contract. Both applications were accepted and policies issued in the State of New York. The policies were then forwarded to the general agencies of the respective companies at San Francisco, each from there forwarded their respective policies to their local agents, one in Seattle, the other in California, to be delivered on the payment of the first premium. In both cases the premiums were payable in New York, and the policies when matured, were payable at the Home Office in New York. Upon this state of facts the California Supreme Court held the contract to be a New York contract, and that the policy could not be forfeited except in the manner pointed out by the New York statute.

For a full statement of the facts it will be necssary to read the case as reported in both the Pacific Reporter and the California State Report.

Griffith vs. New York Ins. Co., 101 Cal. 627.

Griffith vs. New York Ins. Co., 36 Pac. 113.

We invite special attention to the whole of the opinion of the above case as it is exactly in point.

The Supreme Court of Iowa in a case decided but a few months ago, when this question was before it, used the following language:

"As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such law as that above set forth in either of these states. The policy was signed by the president and the secretary of the company, in the City of New York. The premium was made

payable there and the amount of the policy was to be paid, in the event of the death of the assured, at the City of New York. It was also expressly agreed that the policy should be construed to have been made in the State of New York. It was therefore a New York contract, and is to be governed by the laws of that state. Richards, Ins. 44."

Goodwin vs. Ins. Co. (Iowa,) 66 N. W. 157 on p. 160.

The Circuit Court of Appeals for the Sixth Circuit, in a very recent case in an opinion by Judge Taft, says:

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that 'the place of contract shall be the city of Philadelphia, State of Pennsylvania.' In Weyman vs. Southard 10 Wheat. 1-48, Chief Justice Marshall stated it to be a principle of universal law that 'in every forum a contract is governed by the law with a view to which it is made.' See Pritchard vs. Norton 106 U. S. 124, 136, 1 Sup. Ct. 102, and cases there cited. In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. vs. Savings Bank, 72 Fed. 413 on p. 418.

In a recent case this question was in the Supreme Court of Texas. The provisions in the applications for policies in the case (which are identical with this) were that "this application is made to the Mutual Life Insurance Company of New York subject to the charter of the Company and laws of New York. The provisions in the policy were also identical, The court says. "We think the provisions of the New York Statute, under the facts as shown in this case, entered into and became a part of the contract between the parties."

Mullen v. Mutual Life Ins. Co. 34 Southwestern Reporter, 605.

The Supreme Court of Virginia, in a case decided last year in which the provisions of the policy were almost identical with those in the case at bar, sustains our view in this language:

"The policy of insurance provided that it was issued and

accepted upon the further conditions and agreements contained on the following pages which are made a part of this contract, and which contract shall be held and construed to have been made in the City of Cincinnati, Ohio. The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had a right to rely upon them in enforceing his contract so far as they related to its validity, nature, interpretation and effect. Bank v. Rickman, 16 Grat 126, 127; Corbin v. Bank, 87 Va. 665, 13 S. E. 98; 3 Minor Inst., 145; Story, Conf. Laws, sections 263, 280."

Union Central Life Insurance Co. v. Pollard. v26 Southeastern Reporter, 222.

The following authorities fully support our contention that as this contract was wholly to be performed in New York, New York was the place of contract, and the laws of New York entered into and became a part of the contract. Some of the cases have been already cited, but for the convenience of the court we will here collate them.

Phinney v. Insurance Co., 67 Federal Reporter, 493.

Insurance Co. v. Campanhia De Moagens, etc., 167 U. S. 149.

Coglan v. Railroad Co., 142 U. S. 101 at page 109.

Hall v. Cordell, 142 U. S. 116 at page 120.

Washington Bank v. Hume, 128 U. S. 206.

Pritchard v. Norton, 106 U. S. 124 at page 136-141.

Scudder v. Bank, 91 U, S. 406.

Scotland Co. v. Hill, 132 U. S. 107.

Steamship Co. v Phoenix Insurance Co., 129 U. S. 397.9

Penn Insurance Co., v. Bank, 19 C. C. A., 286 on page 21.

Nixon v. Insurance Co., 81 Federal Reporter, (C. C. A.) 79-9

Miller v. Tiffany, 1 Wall. 298 at page 310.

Hyde v. Goodnow, 3 N. Y. 266-269, 23 N. Y. 516, 521.

Griffith v. Insurance Co., 106 California, 627.

Goodwin v. Insurance Co., 66 Northwestern (Iowa) 157 at page 160.

Massachusetts Insurance Co. v. Hale, 23 Southwestern (Ga.) 849.

Mullen v. Insurance Co., 34 Southwestern (Texas) 605.

Insurance Co. v. Pollard, 26 Southeastern (Va.) 422.

Richardson v. Roland, 40 Connecticut, 565.

Arnold v. Potter, 22 Iowa, 194.

Bennett v. Eastern Building Ass'n., 35 Atlantic, 684, 177 Pa. 233.

Greisemere v. Insurance Co., 10 Washington, 208; also 212.

II

THE CLEMENT CASE CHIEFLY RELIED UPON BY PLAINTIFF IN ERROR IS NOT IN CONFLICT WITH THE PROPOSITION THAT A CONTRACT IS TO BE CONSTRUED BY THE LAWS WITH A VIEW TO WHICH IT IS MADE.

The cases cited by plaintiff in error which it claims hold against this contention of defendant in error are not in point. The one chiefly relied upon is the case of Wall vs. The Equitable Life Insurance Company, 140 U. S. 226.

In the first place there is no provision in the contract, (either in the policy or application which together make one contract) stipulating that the contract should be subject to the laws of New York.

In the second place The Equitable Insurance Company as a matter of comity not of right was permitted by the State of Missouri to come into that state and make contracts with the citizens of Missouri. Having been thus permitted to come into the state to make contracts with its citizens it was perfectly competent for the State of Missouri to impose such terms up-

on it and like companies as the state saw fit, or exclude the foreign insurance companies altogether from their territory.

Bank v. Earl, 13 Peters, 519.

Runyan v. Coster, 14 Peters, 122 at page 129.

Hooper v. State of California, 15 Supreme Court Reporter, 207 at page 220

The legislature had passed an act regulating the forfeiture of life insurance policies after the paying of two annual premiums, to the effect that the insured should have the benefit of his reserve by the way of extended insurance. This statute established the public policy of the State of Missouri relative to such contracts. By another provision of the law it was made the duty of any foreign insurance company, if it accepted the privilege of doing business in that State to make all its contracts in compliance therewith. The section last mentioned is in the following words.

"Section 5983. No policy of insurance on life, hereafter issued by any life insurance company authorized to do business in this state on or after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, become forfeited or void by reason of the non-payment of premium thereon, but it shall be subject to the following rules and commutations, to-wit:"

The policy in the Clement case was issued after the first day of August, 1879, as provided in the above section. It must be presumed the company was authorized to do business within the meaning of that section. If so, then it accepted the terms provided in the statute and was bound to make no contract of forfeiture in disregard of the statute. But this it did attempt to do, even though the contract was actually consummated in Missouri. This court held two things: first that the contract was a Missouri contract as it was there consummated; second, and more important than the above, it held that this statute could not be waived by the parties.

If the statute could not be expressly waived by the parties because of the provision of the statute above set forth (which is copied in the opinion of the court) then it must follow that it could not be done indirectly by making the place of contract outside of Missouri in order to avoid this statute. It would be a strange rule of law that would hold the parties could not waive a statute of Missouri and yet hold that it was competent for the parties to avoid the statute by making the place of contract elsewhere. It needs no authority to support this distinction. It suggests itself forcibly and distinctly. No other result could be reached logically. But we are not without authority on the proposition. It has been clearly recognized in two decisions of this court.

In the case of Hume vs. The Ins. Co. 128 U. S. 195 already cited the company was a Connecticut company. The contract was actually consummated in the District of Columbia, but the contract further provided that Hartford, Connecticut should be the place of contract. The Supreme Court of the United States held that the contract was subject to the laws of Connecticut and those laws should control as between the parties to the contract as well as creditors of the insured, and in so deciding, Chief Justice Fuller says:

"And if it is so as between Hume and the Connecticut Companies, then he could not at any time dispose of these policies without the consent of the beneficiary. Nor is there anything to the contrary in the statutes or General Public policy of the District of Columbia."

Washington Bank vs. Hume, 128 U. S. 195 on p. 207.

In other words if there had been a statute or public policy of the District of Columbia which the company was attempting to evade by making the place of contract, Hartford, Connecticut, such provisions of the contract would have been null and void.

In the case of London Assurance Co. v. Companhia De Moagens etc. *supra* the same destinction is recognized. In this case the contract was actually made in Philadelphia. The policy covered the vessel *en route* to Portugal. The contract was to be performed in England. This court held for that reason that it was an English contract and that it would determine the rights of the parties according to the English law inasmuch as construing it by the English law would not in any manner conflict with the policy of the State of Pennsylvania where the contract was actually made. The portion of the opinion below quoted suggests that if the parties were seeking to avoid the public policy of the State o Pennsylvania by making the place of contract England, it would not have enforced it according to the laws of England. The portion of the opinion referred to is as follows:

"This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to our own."

London Assurance Co. v. Companhia De Moagens De Barreiro, 167 U. S. 149.

This same doctrine with reference to this same Missouri statute is very forcibly set forth in a decision rendered by Judge Treat, in which Judge McCrary concurred.

Fletcher v. Insurance Co., 13 Federal Reporter, 562, at page 568.

In a subsequent case the above opinion was cited with approval by Mr. Justice Brewer sitting as District Judge.

Ball v. Insurance Company, 32 Fedreral, at 273, at page 275.

In a subsequent case Judge Caldwell sitting in the same

circuit concurred with Judge Treat, McCrary and Brewer in the opinions above referred to.

Berry v. Insurance Company, 46 Federal, 439, page 441.

Each of the other cases heretofore relied upon can be distinguished in the same way. In each case there was an attempt to make the place of contract in a State other than the one in which the insured lived, in order to avoid the Public Policy or statute of the state where the contract was actually consummated. These cases for this reason are not in point. In none of the cases cited, except the one in the 54 Fed. 580 which was affirmed in the 58 Fed. 723, was there a stipulation that the place of contract was other than the place where the contract was actually consummated. The Circuit Court of Appeals in affirming this decision of the 54 Fed. entirely ignores the point so strenuously insisted upon, but basis its decision on general laws entirely outside the applicability of the Iowa statute. One cannot read the two cases without at once being convinced that the Circuit Court of Appeals did not consider the decision of the lower court sound on the question of the "place of contract." But if it had it would not be in point because the stipulation making it a New Jersey contract to avoid a statute establishing the Public Policy of the State of Iowa would have been void. We ask the Court's careful attention to the decision of the Circuit Court of Appeals in connection with the 54 Fed. believing as we do that there is nothing in it to support plaintiff in errors' claim.

So considering the opinion of the Clement case wholly in connection with the facts in the case, it is very apparent that the true basis of the decision was that the assured living in Missouri, and the insurance company doing business in Missouri, must be subject to the public policy of the State of Mis-

souri, and that it would not allow the parties to withdraw themselves from the beneficial effects of the public policy and the statute of Missouri by making the place of contract outside of the state of Missouri.

III.

WE MAINTAIN THAT THE LEGISLATURE OF THE STATE OF NEW YORK INTENDED THAT THIS STATUTE SHOULD REGULATE THE MANNER OF FORFEITING POLICIES OF INSURANCE BY NEW YORK INSURANCE COMPANIES, NO MATTER WHERE THE CONTRACT SHOULD BE MADE.

a. The highest court of New York has held such was the meaning of the act.

One Carter was a resident and citizen of the state of Georgia. In 1870 the Brooklyn Insurance company of New York issued a policy of Insurance on his life. Where this contract of insurance was consummated is not shown in the opinion or statement of the case. The contract was made six years before the enactment of the law requiring notices. In 1877, 1878, 1879 and 1880 Mr. Carter paid his renewal premiums in Georgia, so according to the plaintiff in error's contention the contract of renewal was made in Georgia. It would not be a renewal within the meaning of the following opinion, until it was paid in Georgia. The Appellate Court of New York was compelled to pass upon thequestion whether or not the payment of a renewal premium was a renewal of the contract within the meaning of the statute. It held that it was. The opinion on this point is as follows:

"Upon this state of facts several questions arose upon "the trial among which the material ones are:

"First. Whether the law of 1876 requiring notices to "be sent to the policy holders, applies to this policy ?" * *

"It is contended by the appellant that the act applies "only to policies 'issued or renewed' after its passage, and "that a policy cannot be said to have been renewed unless "it has become forfeited or lapsed, and has been afterward "restored or renewed by the insurance company.

"The language of the statute, as expressed in the laws "of 1876, is that 'no life insurance company, doing business "in the state of New York, shall have power to declare "forfeited or lapsed any policy thereafter issued or renewed, "by reason of non-payment of annual premiums, or interest, "or any portion thereof, unless a notice in writing stating the "amount of the annual premium or interest due, and when "due on such policy, and the place where said premium or "interest may be paid shall have been duly addressed and "mailed by the company issuing such policy to the insured, "postage paid, at his or her last known post office address, "not less than thirty days nor more than sixty days next "before such payment becomes due according to the terms "of such policy.' This act was amended by chapter 321, "laws of 1877, but, so far as this case is concerned, in no "respect rendering a particular notice of the amendment "necessary. The act should be construed according to the "popular signification of the language used, and with the "view of securing to the policy holders in life insurance "companies the benefits contemplated by the legislature." * * * * *

"We are also of the opinion that the payment, and receipt by the company, of each annual premium constitute a renewal of the policy within the meaning of the term 'renewal' as used in the act."

(The renewal was made by the assured in Georgia.)

"While it was provided by the policy that it should "continue for the term of the natural life of the assured, it "was expressly provided that this was upon the condition "that he should pay the annual premiums as they become "due by the terms of the policy. A failure to pay such "premiums in any year was declared to render the policy "null, void, and of no effect, but when paid it continued by "force of such payment, the policy in existence for the

"period of another. This process each year revived or "renewed the policy as it approached the period of its agreed "termination:" * * * *

"We are, therefore, of the opionion that the plaintiff's "policy was renewed within the meaning of the act. We "are also of the opinion that no such notice was given to "him as the statute required. The law reads that the notice "should be sent to the assured at his known place of "address, and there is no claim but that the defendent knew "his place of address at all times subsequent to the year "1880."

Carter vs. Life Ins. Co., 110 N. Y., p. 15 on p. 20.

Again the appellant court of New York in the 119 N. Y. 450, p. 454, uses the following language:

"The policy itself contained the stipulation that it was "a contract made and to be executed in the state of New "York, and construed only according to the laws of that "state. Aside from the provisions of the policy, and under "general rules of law, the contract was subject to the terms "and conditions expressed in chapter 341 of the laws of 1876, "as amended by chapter 321 of the laws of 1877. This "statute was a part of the contract in question and governed "the rights and obligations of the parties in precisely the "same way, and to the same extent as if all its terms and "conditions had been actually incorporated into the policy."

Baxter vs. B. L. I. Co., 119 N.Y., 450 on 454.

No facts are stated in the above opinion as to the residence of the parties or as to how the question of the applicability of the statute arose. But the language is meaningless unless a similar contention was made to that of plaintiff in error in this cause.

If the appellate court has held according to our contention then this court will follow the construction of this statute placed upon it by the highest court of New York.

"Statute laws may, we think, be properly defined as "the will of the nation expressed by the legislature, ex- "pounded by the courts of justice. The legislature as the

"representatives of the nation expressed in the national will "by means of statutes. Those statutes are expounded by "the courts so as to form the body of the statute law."

Wilberforce Statute Laws, p. 8.

"After a statute has been settled by judicial construction, "the construction becomes, so far as contract rights acquired "under it are concerned, as much a part of the statute as "the text itself, and a change of decision is to all intentions "and purposes the same in its effect on contracts as an "amendment of the law by means of a legislative enact-"ment."

Douglas vs. County of Pike, 101 U. S., 677 on p. 687.

"The rule which has been uniformly observed by this "court in constucting statutes, is to adopt the construction "made by the courts of the country by whose legislature the "statutes were enacted."

Cathcart vs. Robinson, 5 Peters, 264 on p. 280.

"Consequently our duty is, without reference to our "former decisions, to adopt in this case the construction "which the Supreme Court of North Carolina has given to "the limitation statute of that state."

Davie vs. Briggs, 97 U.S., 628 on page 638.

See also Endlich on Interpretation of the Statutes, 1st Ed., Secs. 1264, and cases cited.

b. The language of the act clearly shows it was intended to limit the power of corporations to forfeit a contract except in the manner provided by statute.

We further contend that this statute was in effect an amendment of the charter of every life insurance corporation chartered by the legislature of New York, and that even though the Appellate Court of New York had not passed upon the question and the question was to be here decided for the first time, this court must hold that this statute was a limitation on the powers of the corporation to

forfeit the contract except in the manner pointed out by the statute.

Appellant's contention that the statute was meant only to apply to contracts actually made in New York cannot be maintained. True, the laws of New York could only effect foreign insurance companies when they came within its dominion. It had no further control over them But this corporation that the state gave being, is controlled by it wherever it goes. Will plaintiff in error maintain that this corporation can step beyond New York and make a contract it cannot make in the home state? Does its power to contract along any line increase as it passes the border line of New York? Can it accept a contract from non residents of the state of New York, when it has no power, and it would be unlawful for it to accept a like contract from a resident of its home state? All applications must be accepted at the home office in New York and the policies issued therefrom. Can it make any difference from whence the proposition come, whether from inside or outside of the state? Its powers cannot be one whit greater outside than inside. The foreign state may further limit the power of such corporations in business done in such state, but it cannot increase it. Does the state of Washington when, as a matter of comity to other states, she permits the insurance corporations of such states to come within her borders to trade with her citizens, permit them to come in like free booters, without restraint from the law or charter of the home state, and especially from such provisions in such law or charter, particularly provided for the protection of such parties who deal with such corporations?

This rule was adopted in a case reported in the 138 Pa. upon the following state of facts. The legislature of the

state of Pennsylvania in 1881 passed an act requiring insurance companies "insuring property and lives within the commonwealth of Pennsylvania," to attach to their policies a copy of the application or else they could never rely on a breach of warranty in the application or misrepresentation in it, defeat the policy. The company insured this property in Virginia, where it was located, the contract being there made. The company insisted that the act applied only "to property and lives insured in the state of Pennsylvania." In reply to this argument the Supreme Court of Pennsylvania says: "It is urged, however, that this act of 1881 applies only to "policies upon the lives or property of persons within this "commonwealth, and that as the property insured by the de- "fendant was located in West Virginia the rule above "stated does not apply. We regard this as a narrow con- "struction of the act. We think that it was intended to pro- "duce a uniform rule of procedure, and to apply to all insur- "ance companies incorporated by the laws of this state and to all "other insurance companies insuring lives or property within "this states."

Hebb. vs. Insurance Co., 138 Pa. St., 174 on p. 180.

The same rule is laid down by the Supreme Court of Maryland in the decision reported in the 74th Maryland, upon the following state of facts:

A Pennsylvania corporation received an application in Baltimore, delivered the policy there on receipt of the first premium in Baltimore, Maryland. The law of Pennsylvania above cited contains a further provision that: "Whenever an application for a policy of life "insurance containing a clause of warranty of the truth of the "answer therein contained, no misrepresentation or untrue "statement in such application, made in good faith by the ap- "plicant, shall effect a forfeiture or be a ground of defense, "in any suit brought upon any policy of insurance issued upon

"the faith of such application, unless such misrepresentation "or untrue statement relates to some matters material to the "risk."

The company, regardless of this statute, made every answer in the application an absolute warranty, and were insisting on the breach of warranties as a defense. They insisted that the law did not apply. The Supreme Court on this point used this language: "But the statute of Pennsylvania "which was offered in evidence, enacts that in such cases no "misrepresentation or untrue statement in the application "made in good faith by the applicant, shall effect a forfeiture "or be a ground of defense, unless it relates to some matter "material to the risk. It is beyond question that the powers "and capabilities of a Pennsylvania corporation are conferred "and regulated by the laws of that state, without its author- "ity it could not exist at all. Every contract it makes, every "act it performs, every right it acquires, and every obliga- "tion it assumes, must be by virtue of the same authority. It "may make contracts, transact business, sue and be sued, be- "yond the limit of the state of its origin. But all these "transactions are by the permission of the state where they "occur, and not by virtue of any right belonging to the cor- "poration. Everywhere within and without the state which "created it, its contracts are limited, construed and sustaining "according to its charter and the laws which effect its opera- "tion. In McKine vs. Glen, 66 Mo., 484, this Court said: 'It "is a similar principle, that a corporation and all who deal "with it, are bound by the law of its creation, and all such "laws may be legitimately prescribed by its government by "the sovereign authority from which it derived its corporate "existence.' "

Insurance Co. vs. Ficklin et al, 74 Myd., 172, on p. 180.

A like rule is laid down by the Supreme Court of the United States. In one case a Missouri insurance corporation

became insolvent. It had both property and creditors in Louisiana. The creditors went into a Louisiana court and had a local receiver appointed. By the Missouri statute the insurance commissioner of that state was the party who took possession of the effects and wound up the affairs of such corporations. On the question as to whether the Louisiana receiver, who was the first to get possession of the effects in that state or the insurance commissioner of Missouri should have possession of the property in Louisiana, the Court was called upon to decide and in its decision used the following language:

"Relfe is not an officer of the Missouri State Court, but "the person designated by law (the Missouri state law) to "take the property of any dissolved life insurance corporation "of that state and hold and dispose of it in trust for the use "and benefit of creditors and other parties interested." "*The law which clothed him with this trust was in legal effect "part of the charter of the corporation.* He was the statutory "successor of the corporation for the purpose of winding up "its affairs. * * * We are aware that except by virtue of "some statutory authority, an administrator appointed in one "state cannot generally sue in another, and a receivor appoint-"ed by a state has no extra-territorial power. But a corpor-"ation is the creature of legislation, and may be endowed with "such powers as its creator sees fit to give. * * * * No "state need allow the corporations of other states to do busi-"ness within its jurisdiction unless it chooses, with perhaps "the exception of commercial corporations; but if it does with-"out limitation expressed or implied, the corporation comes in "as it has been corporated. Every corporation necessarly "carries its charter wherever it goes, for that is the law of "its existence. It may be restricted in the use of some of its "powers while doing business away from its corporate home, "but every person who deals with it everywhere, is bound to "take notice of the provisions which have been made in its "charter for the management and control of its affairs both "in life and after dissolution."

Relfe vs. Rundle, 103 U. S., 222, p. 225-6.

The same rule was laid down in Fry vs. Charter Oak Life (Ins. Co., 31 Fed. Rep., 197.)

In a later case the United States Supreme Court adheres

to the rule above stated. The following citation will not show fully how far that court carried the rule; a careful reading of the case will only disclose that.

"A corporation 'must dwell in the place of its creation, "and cannot migrate to another sovereignity.' (Bank of Au- "gusta vs. Earl, 13 Pet., 588), though it may do business in "all places where its charter allows and the local laws do not "forbid. Railroad vs. Kootz, 104 U. S., 12. But wherever it "goes for business it carries its charter, as that is the law of "its existence. (Rolfe vs. Rundle, 103 U. S., 226) and the "charter is the same abroad as it is at home. Whatever dis- "abilities are placed on the corporation at home it retains "abroad, and whatever legislative control it is subject to at "home it must be recognized and submitted to by those who "deal with it elsewhere. * * * * He is conclusively pre- "sumed to have contracted with a view to such laws of that "government, because the corporation must of necessity be "controlled by them, and it has no power to contract with a "view to any other law with which they are not in entire "harmony."

Canada S. R. R. vs. Gebhart, 109 U. S., 527, p. 537-8.

The question of the construction of this New York statute was before the court of civil appeals of Texas, and it sustained our theory as follows:

"The laws of New York (the statute regulating forfeiture of life insurance(would apply to contracts made by insurance companies chartered under its laws, whether the contracts were made in New York or in any other state in the union."

Gunn vs. Miller, 26 S. W. (Tex.), 280, on p. 282.

The Supreme Court of Texas has held that a contract made between a raiaload, chartered by Missouri, and one of its officers in Texas, where the contract was to be wholly performed and which was contrary to the statute of Missouri, prohibiting such corporations from making any contract with one of its directors, was absolutely void. Its opinion in part is as follows:

"Appellee owes its existence to the constitution and laws "of the state of Missouri, under and by virtue of which it

"obtained its being and from which it derived all its "powers. Natural persons may make any contract or "perform any act not prohibited by law, while artificial per- "sons, corporations, can do only those things which by ex- "press grant or necessary implications, they are authorized or "empowered to do by the state under which their charters "were obtained. * * * Had the contract been entered "into by the president and secretary of the company, after "resolution adopted by the board of directors authorizing "them to make it, and had it been executed with strict "observance of all formalities, it would have been void, be- "cause it was prohibited by the laws of the state from which "appellee derives its existence and powers."

Rue v. Missouri Pac. Ry. Co., 74 Tex., 479.

Story on Conf. Laws, 174, 175, note a.

Matthews v. Skinner, 62 Mo., 331.

Black v. Canal Co., 22 N. J Eq., 422.

IV.

THE STATUTE OF NEW YORK COULD NOT BE WAIVED BY STIPULATION TO THAT EFFECT IN THE CONTRACT.

The statute of New York referred to is in part as follows:

"Section 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest or any part thereof, except as hereinafter provided. * * * anything contained (in the policy) to the contrary notwithstanding."

It is not pretended by the company that it ever served the notice prescribed in this statute. In fact the company expressly disclaimed having served the statutory notice. Record p. 190-2. But it insists that the above statute was waived by express conditions to that effect in the policy.

If there is any well settled proposition in law relative to insurance contracts, it is that it is not competent for the parties to such contract to waive the statutes of this character which are based on public policy. This statute was enacted for the purpose of protecting the insured against forfeiture without timely notice. It was intended that the insured should have fully thirty days' notice of the time of payment of his premium, and the same full thirty days in which to prepare for the payment of the same. This statute had scarcely received the signature of the Governor of New York before many of the insurance companies undertook to circumvent the good results intended, by such a clause as this. As a result several courts have been called upon to determine the validity of such a clause, and the conclusion reached by each of the courts has been against the validity of such a stipulation. The Supreme Court of California states the conclusion it reached in part in the following language: "It would seem, "however, that the New York statute was intended to cut "deeper, and as a matter of public policy to inhibit forfeitures "by life insurance companies, except by the method therein "provided.

"No life insurance company doing business in this state "shall have power to declare forfeited or lapsed any policy "* * by reason of non-payment of premium. etc., except as "therein provided.

"The statute is a limitation on the power of the company "to do a specified thing, except under prescribed conditions. "That which a corporation has not power to do, if attempted "to be done by it, is ultra vires, and void.

"Admit that Griffith attempted to waive all notice of "nonpayment of premiums, if the power was lacking in the "corporation to declare a forfeiture in consequence thereof, it is "not perceived how it can be done. The very idea of a waiver "involves the right of the contracting parties to make and "accept such waiver—consent never gives jurisdiction not other-

"wise possessed of the subject matter to a court, for the reason "that it lacks the power to adjudicate such subject matter, ex- "cept as conferred by law.

"A corporation being the creature of the law must confine "its functions to the limits prescribed for its action, and if the "law expressly inhibits it from doing a given thing it is power- "less to do that thing, and, if it can do it only in a given man- "ner, the prescribed method become the measure of its power."

"We are not met with any suggestion that the statute in "question is violative of any chartered right of the defendant, "and, in the absence of a showing to the contrary, must assume "the New York statute to be in consonance with its constitu- "tional and chartered rights."

"The statute in question is regarded as indicative of the "legislative will that, aa a matter of public policy, life insur- "ance companies should be deprived of the power to declare "policies forfeited for non-payment of premiums,except in the "prescribed mode, and that being deprived of the power so to "do, a waiver on the part of the insured cannot be construed "to confer such power in the face of the law which has taken "it away."

"The reasons for such a policy are so numerous and obvi- "ous that it is not deemed necessary to occupy time and space "in specifying them."

Griffith vs. New York Life Ins. Co., 101 Cal. 627 on p. 641–2.

The Supreme Court of Michigan announced the same result in construing a policy of insurance made in New York and subject to a similar made in reference to assessment societies passed in 1892. It uses the following language: "The contract of insurance was made in the state of New York, and is governed by the laws of that State. * * * * The notice sent to the insured, in the present case, did not comply with this statutory provision. The design of the statute is apparent. A policy in regular life company fixes both the time of payment of premium and the amount thereof; yet that same statute provides that no life insurance company can

declare forfeited or lapsed any policy by reason of the non-payment of any premium without notice, and prescribe what such notice must contain. It further provides that, in case payment is made within the life of the notice, it shall be taken to be in full complicance with the requirements of the policy, anything therein contained to the contrary notwithstanding. Their statutory provisions form a part of the contract of insurance and cannot be waived by the parties. Not having given such notice in the manner prescribed by the statute, it cannot be allowed to declare a forfeiture of the policy by reason of its non-payment."

Warner vs. Life Association, 100 Mich. 157 on p. 159-60.

The Supreme Court of Washington had the same question before it in construing the same law in reference to an insurance contract that contained this same clause verbatim, though the point was not discussed in the opinion yet it was presented fully, and of course was fully considered by the court in its deliberation thereon. In order that this court may know that the same point was before it we will ask leave to file one copy of appellant's brief and one copy of respondent's brief.

Grisemer vs. Insurance Co., 10 Wash. 202 and 211.

The ninth Circuit Court of Appeals uses language appropriate to the discussion of this point.

"The statute of New York, (the one we are here considering) prescribes the conditions on which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived by the company, or the assured, or by both together. Society v. Clements, 140 U. S. 226, 233; Hicks v. Insurance Co,, 9th C. C. A., 215; Griffith v. Insurance Co.,(Cal.) 36 Pac. 117; Warner v. Association, 100 Mich., 157."

Nixon v. Insurance Company, 81 Federal, 796, 802.

The Supreme Court of Virginia, in a policy almost identical in its terms with the one in this case, where the contract

was made in Virginia and contained a clause stipulating away the provisions of a statute of Ohio where the contract was to be performed, held that such waiver was a nullity in the following words:

"It, (the statute)is therefore as much a part of every contract insurance of life governed by the laws of the state of Ohio and made after that statute was passed, as if incorpated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws,and no waiver of the parties nor stipulations in the contract can change the law. Hermany v. Ins. Co., 151 Pa. State, 17; Ins. Co. v. Ficklin, 74 Md., 172; Ins. Co. v. Leslie. 47 Ohio State, 409; White v. Society, 163 Mass, 108."

Insurance Co. vs. Pollard, 26 Southeastern, 421, p. 422.

The Supreme Court of Maryland has passed on a very similar condition in a policy of insurance that attempted to stipulate away a law for the benefit of the insured passed by the legislature of Pennsylvania. The contract was made in Maryland, but the corporation was chartered in Pennsylvania, a case clearly in point. The Supreme Court speaking through Mr. Justice Bryan, uses the following forcible language: "The Pennsylvania statute enacted that whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant shall effect a forfeiture. * * *

"In other words, the statute is to be entirely overthrown and set aside; and the insurance company under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way. If an untrue statement material to the risk is warranted, the policy is void; but the invalidity of the policy depends upon the fact whether the statement is material to the risk. The materiality of the statement is the indispensible condition on which the invalidity of the

policy depends, and it must be established by proof. It is not competent to substitute for this proof an agreement of the parties that it should be considered material. Neither can an agreement be valid which gives an effect to a warranty, which is in defiance of the statute. The legislature enacted a rule for the regulations of the contracts of insurance companies, which is a matter of public interest and concern. The operation of this rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts; on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from them."

Fidelity Ins. Co. vs. Ficklin, 74 Md. p. 172 on p. 185-6.

The Supreme Court of the United States has held the same in deciding the validity of such a condition stipulating away the benefit of a Missouri statute. The court says: "It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium after three premiums have been paid; as well as the insertion, in the application, of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not, is an ineffectual attempt to evade and nullify the clear words of the statute."

Insurance Co. vs. Clemens, 140 U.S. 226, on p. 234.

The Supreme Court of Pennsylvania has held that a statute of this kind cannot be waived. The opinion of the court is in part as follows:

"In the portion of the charge recited in the 17th specication, after referring to provisions of the act of 1885, relating to warranties in applications for life insurance policies, heretofore briefly noticed, and also to the fact that the policy in suit contains a waiver by the insured of the provisions of any statute which might affect the contract of of insurance as expressed in said policy, etc., the learned

judge held in substance, and so instructed the jury, that notwithstanding such comprehensive waiver, full force and effect must be given to the provisions of said act. * * *

"The evident purpose of this legislation was to strike down, in this class of cases, literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. This provides a rule of construction for the purpose of preventing injustice; and it is as much the duty of courts to enforce such rules as it is to administer the statutes of frauds and perjuries. It would be contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver such as was insisted on in this case. The court was therefore right in holding that the was invalid.

Hermany vs. Life Association, 151 Penn. 17, on p. 24.

Judge Brewer, when sitting as circuit judge in the western district of Missouri, had occasion to review this question, and in a very able opinion says:

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce. Railway Co. vs. Peavey, 29 Kan. 169. The legislature has by this language declared a rule in respect to forfeitures in life insurance policies; it has thus established the policy which it believes should obtain in this state, and, though sitting on the federal bench, it is my duty to administer the laws of this state in the spirit in which they were enacted, and to uphold both their letter and their spirit."

Wall vs. Equitable Assur. Soc. 32 Fed. 273 on p. 277.

A case from Georgia is also in point. "The contract was

made in Georgia, but, as in this case, it was expressly stipulated in the contract that it should be subject to the laws of the state of Massachusettes, in which state it was provided by statute that "no such company (Insurance company) shall make any stipulation in its insurance contract concerning the court or jurisdiction wherein the suit thereon may be brought, nor shall limit the time in which suit may be commenced to less than two years after the cause of action accrues, and any such condition or stipulation shall be void. Held, that the stipulation in the policy limiting the time in which suit may be commenced thereon to one year from the termination of the life of the member to whom it is issued is void."

Insurance Co. v. Hale, 23 Southeastern, 849.

In a recent case in the Court of Appeals of Texas that court passed upon the question of waiver of this particular statute. The syllabus as it appears in the Southwestern Reporter states the decision of the court accurately in the following words:

"Though a policy of life insurance was issued by a New York company to a citizen of Texas, containing a provision to the effect that, if any of the premiums were not paid when due, the policy would become void, and that notice that each premium would be due at the date named in the policy was given by the policy, and that any other notice required by any statute was thereby expressly waived, the statute of New York enacted in 1876 (requiring notice to be mailed to the assured at least thirty days before the premium was due, in order to cause a forfeiture) applied, and a notice sent 15 days before the premium was due was insufficient."

Insurance Co. v. Smith, (Texas) 41 Southwestern, 680.

Similar quotations might be made from many other courts, some of which we will have occasion to cite subsequently in discussing other points.

We will at this point add the following references.

Reilly vs. Insurance Co. 43 Wisconsin 449.

Chamberlin vs. Insurance Co. 55 N. H. 249.

Emery vs. Insurance Co. 52 Me. 322.

White vs. Iusurance Co. 4 Dil. 177.

Ins. Co. vs. Leslie 47 Onio St. 409.

White vs. Society 163 Mass. 108.

Ins. Co. vs. Rudwig 80 Ky. 223, 233-5.

b

The statute of New York is a limitation on the power of an insurance company to forfeit a contract of insurance except in the manner provided by statute.

1. We have already discussed this proposition in preceeding portions of this brief on pages 51 to 62 inclusive and will not extend the argument along that line line, but respectfully request and urge the court to consider the whole of that argument in connection with and as a part of the argument on this point.

We have shown, we think conclusively, in the preceeding argument that the highest court of New York in the cases of Carter v. Insurance Company, 113 New York, 110, and Baxter v. Insurance Company, 119 New York, 450 on page 454, sustains this contention. If we are right in this, those decisions must control every contract made with a New York insurance company issued subsequent thereto, no matter where made.

2. We have also shown that the language of the act clearly shows that it was the intention of the legislature to limit the power of the Insurance corporations chartered by

the state of New York to forfeit such contracts, except by strict compliance therewith. This being true, it will not be contended for a moment that the attempt to waive the statute by a clause to that effect in the contract would have any force or effect, because the statute expressly provides that a policy shall not be forfeited for non-payment of a premium except by service of the statutory notice, "anything to the contrary notwithstanding," thus specifically including the right of waiver. So without repeating the argument and reciting the authorities, we earnestly request to consider all of the argument heretofore urged on pages 51 to 62 inclusive, as fully supporting this contention.

c

A contract void in whole or in part by the laws of the place of performance is void everywhere.

We have already shown that this contract was to be performed wholly in New York. The Insurance Company by the terms of the contract which it prepared could exact performance at its home office in the city of New York and not elsewhere. By the laws of that place it could only exact performance of the payment of a premium by serving the statutory notice. If any forfeiture occurred it was by reason of the non-payment of a premium on a policy in the City of New York. If any right to declare a forfeiture occurred it was by reason of a non-payment of a premium—a non-performance of the contract—in New York, but no right of forfeiture of an insurance contract could occur, no right to declare a forfeiture could exist in New York until the statutory notice had been served. Service of the statutory notice

was a prerequisite to the right of forfeiture, or the right to declare a forfeiture on behalf of the insurance company. In other words, the plaintiff in error, in so far as it was exacting or insisting on a forfeiture, was doing business in New York within the meaning of the act, and within the jurisdiction of the New York laws, and it had no right to declare a forfeiture, except by a strict compliance on its part with such laws.

In a recent case decided by the Court of Appeals of New York it stated the proposition in these words:

"A contract which is illegal and void, either by the law "of the place where it is made, or that of the place "where it is performed, is illegal and void everywhere."

Hyde vs. Goodnow, 3 N. Y., 266–269.

This decision having been announced prior to the execution of this contract was as much a part of the contract as the statute. The company knew that such would be the construction of the contract by the courts of that state whenever it undertook to enforce the forfeiture provision of the policy in New York where it alone could exact a forfeiture.

The Supreme Court of Missouri on the same question used this language:

"A contract for a loan made payable in a foreign country may stipulate for interest higher than allowed at home, and if the contract is illegal there it will be illegal everywhere."

Bank of Louisville vs. Young, 37 Mo. 378

In a case decided in the Supreme Court of Massachusetts, Justice Carey uses this language:

"The notes in suit having been made and payable in Louisiana, the question of the validity depends upon the law of that state. If they are void by that law, they are void everywhere."

Stevenson vs. Payne, 109 Mass 378.

Mr. Story in his "Conflict of laws" (Redfield's edition), section 242, uses this language:

"Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country, for, as we shall presently see, in the latter case the law of the place is to govern. If valid there, it is by the general law of nations, *jure gentium*, held valid everywhere."

Section 253: "The same rule applies *vice versa* to the validity of contracts. If void or illegal by the law of the place of contract they are generally void and illegal everywhere."

Our contention then is not only supported by authority, but it is by reason as well. Supposing a railroad corporation chartered by New York had a line of road from New York to Albany. That it was contrary to the public policy of that state for such companies to exempt themselves from negligence by a clause to that effect in a contract to carry a passenger over their lines. That it had an agent in the state of Washington who had in its behalf entered into a contract with a citizen of Washington to carry him from Albany to New York, with a clause in such contract exempting itself from liability from damages on account of negligence of its officers and agents, and that such a waiver of a liability was perfectly proper according to the laws of Washington. Would it be contended for a moment that such a waiver would be of any force or effect when the contract was to be wholly performed in New York?

Such a construction of the contract can do no injustice to the Insurance Company. The Insurance Company being a citizen of New York is conclusively presumed to have known the statutes and public policy of that state. It drew the contract in such form and in express words made it subject to the laws of New York. It knew that the courts of New York, as well as any

other court, would not enforce a contract of forfeiture within New York except in compliance with its laws. It knew it was inserting in this contract an agreement in entire disregard of the public policy of the state in which it had caused the contract to be performed. This court must decide this case and enforce this contract just as the courts of New York would, if the matter was before them. Would the Appellate court of New York enforce a forfeiture of contract to be performed in New York contrary to and in entire disregard of the public policy and statutes of that state?

The business, the making of the contract, was business done in New York. If any forfeiture occurred it occurred in New York, any right to declare a forfeiture occurred by reason of non-payment of a premium,—a non-performance of the contract in New York.

As we have already shown this statute is a limitation on the powers of every corporation organized in New York and they cannot forfeit a contract except in compliance with it. That the legislature of New York had the power to thus limit them is not disputed. The appellate Court of New York, as we have already shown, were similar and the court held to the same rule. Either all these courts are wrong, together with other courts, to which we have cited this court or else the company is wrong in its contention.

V.

KNOWLEDGE OF THE DUE DATE OF THE PREMIUM BY THE INSURED DOES NOT AVOID THE SERVICE OF THE STATUTORY NOTICE. THE SERVICE OF A NOTICE WHICH DOES NOT CONFORM IN MATTER OR CONTENTS TO THE REQUIREMENTS OF THE STATUTE, AND NOT SERVED THE THIRTY DAYS REQUIRED BY THE STATUTE, IS OF NO AVAIL.

Plaintiffin error claims that the converse of each of the above propositions are true, and that the court erred in refus-

ing the requested instuctions to that effect, and as contained in specifications of errors 21 and 22, Record, page 378-9.

The court did not err in refusing said instructions for the following reasons:

a. Specification of Errors XXI., XXII., are not well taken because they are not based on instructions which assume facts of which there was no proof.

b. Knowledge of the due date of the premium by the assured does not avoid the service of the statutory notice in order to forfeit tne contract.

c, The company did not allege the service of any notice, but on the contrary stated to the court and counsel it was not claiming to have sent any notice and would not on the trial of the cause.

a

The instructions requested by plaintiff in error and assigned as errors were properly refused on the well established rule that it is wrong to base an instrnction on assumed facts of which there is no evidence to establish. The above instructions requested the lower court to charge the jury if they should find that "Mr. Phinney (1) came to the representatives of the company, and requested further time in which to pay said premium, (2) and such extention of time was refused by said representative, (3) and said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, (4) and the said Phinney thereupon stated that he was unable to pay such premium * * * then you must find a verdict for defendant."

There is absolutely no evidence which tends to establish eiither of the above four probative facts included in both requested instructions. All the evidence on the same is set forth

in the record, on pages 176 to 194 inclusive, under heading *20th exception.* There is not only no evidence tending to support such probative facts, but all the evidence is absolutely contradictory thereof. As the evidence is quite short, for the convenience of the court, we will quote it in full:

"Q. What did Phinney do in response to that notice, if anything?" A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company and asked me if I could not take his note for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company, and they would take only cash. I think a few days before it was due, perhaps three or four days, I met him again, and we had a similar conversation, and I told him about the same again, that I was unable to carry his notes; that I did not have the cash to put up to the company.

"Q. Did he ever make any payment of that premium you?" A. Not to me; no, sir.

"Q. Who else in the State was authorized to receive and collect premiums?" A. No one.

"Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due and was unpaid with reference to this particular premium? A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten day, I should say—between one and two weeks after it was due, he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it, and then he told me that he was prepared to pay the premium.

"Q. What, if anything, did he ask you to do? A. He told me that if I would bring the renewal receipt, or words to that effect, that he would pay the premium.

"Q. State what occurred between you and what you said to him and what he said to you." A. I told him that I could not not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank—I am not positive about that. He told me that he did not think that he could pass for a certificate of health, from the fact that he had been rejected by the Equitable a few days before.

"Q. When did you next see him?" A. Well, I saw saw him so often I could not fix any particular date. Copy (265).

"Q. You say Phinney let you have this policy for canvassing purposes?" A. Yes, sir.

"Q. Now, you would not care to have a dead policy for canvassing purposes?" A. It would not make any difference whether it was dead or alive.

"Q. You would not want to say that Phinney has a policy issued for a hundred thousand and it was such an expensive contract?" A. That is part I should not state if I was canvassing. I should show the contract.

"Q. For the purpose of soliciting you would let them understand it was a live policy?" A. Yes, sir.

We do not think any argument is necessary. The above quotation containing all the evidence, and the evidence too, of their own witnesses, condemns the instructions requested. Mr. Phinney was arranging for the payment of the premium by short time note. The note, not an extension of time, was refused. Even though an extension of time was not asked, the evidence shows that the company constantly led Mr. Phinney to believe, both before and after the due date, of the premium, that if he could get the money it would accept it in payment of the premium, hence, by its conduct granted an extension of time. This is all the evidence of a request of an extension of time, and

on the other hand that the company granted an extension. The very opposite of the assumption that an extension of time was refused. (3). Phinney could not know and recognize that the policy would be forfeited unless the premium was paid, except on condition of prior statutory notice. If he did think so it would be a mistake of fact. The mistake of the law of another state is a mistake of fact not of law. (4). The above evidence shows conclusively that Mr. Phinney did not state "that he was unable to pay the premium," but on the contrary shows that he was maintaining that he could pay it, and finally proved that he was stating the truth by tendering the premium. This same agent, in his report to the company, by letter, dated November 26, 1891, said "Phinney offered to pay (premium) but in ill health," also on December 10, 1891, the agent of the company, in response to telegram from the company instructing the agent not to accept Mr. Phinney's premium if tendered, answers as follows:

SEATTLE, Washington, Dec. 10, 1891.

"*A. B. Forbes, Esq., General Agent.*

"DEAR SIR,—Your wire of the 9th inst., reading, 'If tendered, decline acceptance September premium No. 422198, Phinney,' duly received.

This prewium was tendered a few weeks ago, but wus refused by me, as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON."

Does the above show that the company and its agent understood Mr. Phinney to say he could not pay the premium?

b

Knowledge of the insured of the due date of the premium does not avoid the serving of the statutory notice.

The legislature of New York provided that the only method of forfeiting a contract was by serving the statutory notice in the manner prescribed by the statute anything in the contract to the contrary notwithstanding. It provided one method and one method only for forfeiting the contract and for proving such forfeitute. No other method or form is recognized by the statute. No other reason for this rule need be stated. The decision of the courts are uniform to the effect that even though a printed notice is served the statutory time it is unavailing if there is any departure from the requirements of the statute as to form or contents. In each of the cases hereafter cited under this point the assured had actual notice, but not the statutory notice. The court of appeals of New York in a case where a like contention was urged, uses this language.

"We are also of the opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantage proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event 'a policy will become forfeited and void,' conveys a meaning easily to be comprehended. To refer to the policy and conditions and say that 'members neglecting so to pay are carrying their own risk,' is quite another thing; and while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology, it is not the language of the statute and does not embody the notice which the statute requires. The principle upon which our decision, in the recent case of Carter vs. Brooklyn Life Insurance Company (110 N. Y. 15) rests, applies and requires that the appeal should succeed."

Phelan vs. Northwestern Mutual L. Ins. Co. 113 N. Y. 147 on p. 151-2.

In a prior case the Lower Court uses this language:

"The statute,, however, imposed the duty upon the defendant of sending the notice to the plaintiff in a particular manner and when it did so it acquired the right to declare a policy forfeited for the non-payment of the stipulated premiums. It was, therefore, incumbent upon the defendant to show that it had complied with the terms of the statute, and

it did not do this by showing a delivery of the notice to another person than the plaintiff. Such notice gave it no right to declare the policy forfeited, and in so doing it acted illegally."

Carter vs. Ins. Co. 110 N. Y. 15 on p. 23.

In subsequent case the same court uses this language:

"Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, and this step was essential in order to put the assured in default, or to raise any point based on his omission to pay the last quarterly premium."

Baxter vs. Ins. Co. 119 N. Y. 450 on p. 455.

In a later case the same court says:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frece vs. Insurance Co. 136 N. Y. 144 on p. 151.

An examination of the above cases from the highest court of New York will show that it fully sustains the doctrine announced. They have been followed fully in every other court when the same statute has been under consideration. The Second Circuit Court of Appeals sitting in New York when a like question was before it speaking through Judge Wallace says:

"The polices, being New York contracts, were, of course, dominated by the statute respecting forfeitures, as completely as though the statutory conditions had been explicitly incorporated in them. The adjudictions of the highest court of the state treat it as one which must be strictly interpreted in favor of the assured, and hold that the defense of a forfeiture through no-payment of premium is not availing to an insur-

ance company, if there has been any departure on its part from the provisions of the statute in regard to notice. (Carter vs. Insurance Co., 110 N. Y. 15, 17 N. E. 396; Phelan vs. Insurance Co., 113 N. Y. 147, 20 N. E. 827; Baxter vs. Insurance Co., 119 N. Y. 450, 23 N. E. 1048; McDougall vs. Assurance society, 135 N. Y. 551, 32 N. E. 251; De Frece vs. Insurance Co., 136 N. Y. 144, 32 N. E. 556,) The statute declares, in substance, that no policy shall be forfeited for default in the payment of premium until a notice shall have been served by mail upon the assured, calling his attention to the day when a payment has fallen due, and to the consequence of a default. The notice must state that, unless the premium shall be paid in 30 days after the mailing of the notice, the policy will become void. The intention is obvious, from the language, that the person insured shall have 30 days within which to make payment and save forfeiture after the mailing of the notice. The policy cannot be forfeited 'until the expiration of 30 days after the mailidg of such notice.'

Hicks vs. Ins. Co., 9 C. C. A. 215, on p. 217.

Each of the following cases fully support the doctrine announced in the foregoing cases,

Nixon vs. Ins. Co. (C. C. A.) 81 Fed. 795, 802.

Griffith vs. Ins. Co. 101 Cal. 627.

Griesemere vs. Ins. Co. 10 Wash. 202.

Ins. Co. vs. Mullen 34 S. W. 605.

Warner vs. Ins. Co. 100 Mich. 157, 159-60.

c

The Company in open court disclaimed any reliance upon or claim to have served the statutory or any other notice.

The evidence as to any notice being sent was brought out by plaintiff in error offering evidence to establish a rescission and surrender of the contract, at least this was the understanding of counsel. There was no other issue under which it was admissible. The defendant in error so understood it

as well as the court by reason of the plaintiff in error a few days prior disclaiming any intention or purpose of claiming the benefit of any notice, otherwise it would have been objected to and excluded. The disclaimer was made by plaintiff in error after mature deliberation and in the most solemn manner. We will quote fully from the bill of exceptions on page 190, 191 and 192.

"On April 23, 1895, plaintiff sued out a commission for the taking of the disposition of H. E. Duncan, Richard A. McCurdy and W. J. Easton, all officers of the defenant corporation; also for the taking of the dispositions of A. B. Forbes and Stanley Forbes. Said A. B. Forbes, from September 24, 1890, to the commencement of the suit, was general manager of said defendant company for the Pacific Coast including Washington, and Stanley Forbes during all of said time being its cashier." (The purpose of this evidence was to obtain evidence to rebut any evidence that might be offered by plaintiff in error to the effect that the statutory notice, or any kind of notice, was ever served by plaintiff in error on Mr. Phinney.) "That among the interrogatories to be propounded to said Richard A. McCurdy, also said W. J. Easton, also to H. E. Duncan, also to said A. B. Forbes, and also to said Stanley Forbes, were, among others, the following interrogatories:

"Q. State fully what from of premium notices were used, if any, by the Mutual Life Insurance Company of New York to notify the parties Insured in said company, that premiums would become due on policies issued through Pacific Coast agencies, on parties residing in the State of Washington, during the years of 1890, 1891, 1892 and 1893. If more than one form was used, state fully what each contained.

"Q. Attach to this disposition copies of each and every form of notices used as described in the preceding interrogatory during the time therein mentioned.

"That defendant's attorneys filed written exceptions

thereto on the ground that the same was incompetent, irrevalent and immaterial.

"Whereupon said defendant, by its attorneys, then stated and declared to plaintiff and said court that said defendant was not claiming to have mailed any notice to said Phinney. That it had not alleged in its answer that it had mailed any notice to said Phinney, and was not claiming and would not claim any benefit from the mailing or sending any notice to said Phinney. Whereupon relying upon the statements of said counsel, said court sustained defendant's objections and exceptions to said interrogatories and denied to plaintiff the right of having said interrogatories answered."

Record p. 190, 192.

Comment on the foregoing is unccessary. If court and counsel cannot rely upon such disclaimer and statements of counsel, then the preparation and trial of a case is a farce. No court will, in this manner, allow counsel to mislead, entrap opposing counsel in any such manner.

As we have said in the opening of this argument we have given more attention to the above point than it deserves; but the argument above made together with the authorities cited is applicable to the discussion of point number three in plaintiff in error's brief. What we have said above applies with equal force in answer to the argument of counsel on the question of waiver, abandonment and rescission of a contract, etc., etc., under point No. 6 of plaintiff in error's brief, and we ask the court to consider this argument on that proposition.

VI.

DEFENDANT IN ERROR DID PROVE HER ACTION AS ALLEGED.

Defendant in error alleged that the insured duly performed all the conditions of the contract by him to be performed.

This she proved. The payment of the first year's premium was admitted by defendant in error. No second premium was due and payable until the statutory notice was served. It was not necessary to prove the payment of any other premium until the defendant had proved that it had served the statutory notice, which it failed to do. In our pleading we follow the cases of Baxter vs. Insurance Co., 119 N.Y. 450; De Frace vs. Insurance Co., 136 N.Y. 144, and the cases of Griesemer vs. Insurance Co., 10 Wash. 202, also 212.

The discussion of the next point, No. 5, raised by plaintiff in error, will also cover this point. We will at once proceed to discuss it, and ask the court to consider all we may say thereon as a continuation of this discussion.

VII.

IT WAS NOT NECESSARY THAT DEFENDANT IN ERROR SHOULD TENDER ANY UNPAID PREMIUM BEFORE SHE COULD MAINTAIN HER ACTION.

It is admitted that the contract was made and the first premium thereon paid and that the contract was in all respects valid. The contract having once been made the same could not be forfeited except in the manner prescribed by the statute. The premiums were not due until thirty days after the service of the statutory notice. The insured fully complied with his contract when he paid such premium after the service of the statutory notice. The statutory notice was not served, consequently no second premium ever became due. Hence, the insured fully complied with

all the conditions of the contract. There is no condition in the policy requiring the executrix to pay unpaid premiums, but on the contrary the policy provides that the company may retain unpaid portion of premiums when it pays the policy. (See Record, p. 4.) The above has been fully sustained by every court that has been called upon to pass on the question. The first court to decide the question was the appellate court of New York. The pleadings were practically identical with the pleadings in this case. In fact we followed that decision believing that any court that would be called upon to construe the statute of New York would follow the decision of the highest court of that state, and more than that we believe it to be good law. The above mentioned court discusses the case very ably, and we cannot do better than quote the decision both because the decision is binding, and is also good law and discusses the question with great ability.

"The complaint alleged the delivery of this contract to the insured, his death on the 7th day of September, 1884, the presentation to the defendant of satisfactory proofs of death, according to the terms of the policy, the refusal of the defendant to pay, and that the insured had made the payments of premium according to his agreement with the defendant No issue was made by the defendant upon any of the allegations of the complaint except the averment that the insured had paid the premiums according to the terms of the policy, which it denied, and specially alleged that the premiums which became due on the 24th of August, 1884, had not been paid, (almost the identical language of the premiums in this case by both parties). * * There was no proof given at the trial by either party to show whether this notice was served or not. * * * In the absence of proof, on the part of the defendant, as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and the statute when read together. Before the defendant could raise any question in regard to the non-payment of the August premium, it was

necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default, or to raise any point based on his omission to pay the last quarterly premium. * * * "It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the twenty-fourth of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured or her asignee, except to present to the defendant the proofs of death required by the policy."

Baxter vs. Ins. Co. 119 N.Y. 450, 453-7.

In a still later case this decision was upheld by the same Court in which all the Justices concurred. The following quotation states the necessary facts:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it become necessary to consider the question of the sufficiency of the notice served."

De Frace vs. Ins. Co. 136 N.Y. 144 on p. 151.

The Supreme Court of the State of Washington and the Supreme Court of Texas have both followed the above decisions of New York, as they should do, since the construction placed upon the New York statute by the highest court of New York is binding upon any other state where the statute is invoked.

Griesemer vs. Insurance Co. 10 Washington, 202.

Griesemer Administratrix vs. Insurance Co., 10 Washington, 211.

Insurance Co. vs. Mullen, (Tex.) 34 Southwestern, 605.

a

No tender was necessary because the company had denied all liability on the contract.

The evidence of plaintiff in error is to the effect that about the time the second premium became due, Mr. Phinney called to arrange for the payment of the premium by giving a short time note. That the agent informed Mr. Phinney he could not take his note but must have the money. A few days after the premium was due Mr. Phinney called to see if he could arrange about the payment of the premium, again the agent told him he must get the money. This was repeated several time within 30 days of the due date of the premium, as mentioned in the policy; at about that time Mr. Phinney tendered the premium and the agent told him the policy had been forfeited for non-payment of premium. The policy had already been entered upon the books as a forfeited policy.

After Mr. Phinney's death, his executrix informed the company of his death and asked of the company what she should do in order to obtain payment of the policy. The Insurance Company informed her that the policy had been forfeited for the non-payment of premium and denied liability on such contract.

The company having taken that attitude cannot claim that we ought to pay a premium on a policy that it had already repudiated as forfeited and void. Does the company mean to say now that it was acting in good faith; that it was trying to mislead us, and that it would have taken the pre-

miums? Surely it cannot take such a position, and if it did, this court would not permit it. It is an old maxim of the law that no court will compel a party to do an utterly useless act. The company took the position that the original contract had ceased to exist and that there was no contract. We had a right to and did assume and believe that such was its ground of defense.

The Supreme Court of Washington in a case exactly identical with this, Griesemere vs. The Mutual Life Insurance Company of New York (this same plaintiff in error), has held the foregoing to be the law. The opinion is by Mr. Justice Hoyt, as follows:

"In our opinion the question of tender in the case at bar was within this exception. It appears from the notice sent by the company upon the receipt of proofs of death, that the company entered upon the investigation of the rights of the claimant under the policy and held that they were terminated by the non-payment of the premium. And we think that enough appears to show that the company elected to stand upon the forfeiture growing out of such non-payment, and would have refused any tender of such premium. * * *

"Hence the action can be maintained without such tender having been made."

Greisemer vs. Mutual Life Insurance Co., 10 Wash. 202 on p. 210.

Griesemer Admx. vs. Mutual Life Insurance Co., 10 Wash. 211.

It is thus seen that the highest court, both of Washington and New York, has held that a tender of premium was entirely unnecessary. Defendant in error, living in the State of Washington, had a right to rely on these authorities as establishing the law of the case, and upon which she could rest with absolute confidence, one being the law of the place of contract, the other the law of the forum. This plaintiff in error was familiar with these decisions when she commenced this action. No court will tell her she was in

error in relying upon them confidently as settling the question. Would it not be doing her a great wrong and injustice to dismiss her action and compel her to tender a premium on contract that company has repudiated, and that, too, contrary to the laws of the place of contract and the forum as well.

"The proposition is thus expressed by this court at its last term in Hills v. Exchange Bank, 105 U. S., 319, as a result of the cases above cited. 'It is a general rule that when the tender of the performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unecessary when it is reasonably certain that the offer will be refused.'"

Kauffman v. Lee, 106 U. S. 196 on p. 202.

The above is fully supported by the case of United States v. Peck, 102 U. S., 64; Poindexter v. Greenhow, 114 U. S., 270-282; Lawrence v. Miller, 86 New York, 136, Insurance Co. v. Vining, 7 C. C. A. 359; Insurance Co. v. Smith (Ohio) 5 Northwestern, 417.

VIII.

THIS CONTRACT WAS NOT WAIVED, ABANDONED, OR RECINDED. THERE WAS NO EVIDENCE JUSTIFYING THE COURT'S SUBMITTING THAT QUESTION TO THE JURY.

a

It is true the court denied the instructions requested relative to the above proposition, but the court did submit it to the jury. We claim the court correctly denied the instructions and further contend that it ought not to have submitted the proposition at all, and if the court erred at all, it erred in favor of the plaintiff in error.

The contention of the plaintiff in error that this con-

tract was terminated by a waiver, abandonment or rescission of the contract is simply stating that the defense of a forfeiture or waiver of the contract in other words. It is nevertheless the same defense.

The Company never claimed an abandonment or rescission of the contract until it filed its answer in the cause. When Mr. Phinney tendered the premium, the agent of the Company refused it and informed him his contract was forfeited and of no value. Record p. 178. The Company refused the tender of his premium, not on the ground of rescission, but on the ground that the contract was forfeited. The Company instructed its agents not to receive the premium on the sole ground that the policy was forfeited. Richard A. McCurdy, the president of the Company, when asked what negotiations, if any, were had with Mr. Phinney looking towards an abandonment, rescission or waiver of his contract, answered that he did not know of any and did not know that any parties were employed or requested to obtain a rescission, etc. Record, pp. 183, 184.

Mr. Duncan, the corresponding secretary, testified to the same effect, as well as Mr. Easton, the general secretary of the Company. It was entered in the books as follows:

"Forfeited September 25th, 1891. Do not restore. Second vice president. 28th March, 1892."

Record, p.

A report was made on Mr. Phinney by their inspector of risks on January 2nd., 1892

"Financially all right. His drinking habits commented on as injurious to health. He drinks intoxicating beverages daily; not so much as to become drunk, but enough to ruin his health."

Another report, the date of which the Company did not state.

"No. 422192.

Amount, $100, 000.00

Name, Guy C. Phinney.

Residence, Seattle, Washington.

Business, President City National Bank.

Date of investigation. Forfeited.

Remarks, All right fin. but too heavy and flabby. Has taken to drinking of late and ought not to be re-instated. Awaiting particulars.

(Signed) Stark."

Record p.

When Mrs. Phinney notified the Company of the death of Mr. Phinney, they acknowledged receipt in the following words.

"We beg to advise you that policy No. 422198 on the life of the late Guy C. Phinney was forfeited September, 1891, for non-payment of premium. This policy therefore has no value."

Plaintiff's Exhibit "D", Record p. 189.

At about the same time the general agent, Mr. Pond, wrote Mrs. Phinney as follows:

"We beg to advise you that but one annual premium was paid on your husband's policy 422198 for $100,000.00 and therefore lapsed in September, 1891."

All this shows beyond any manner of question, that up to the time plaintiff in error filed its answer, it was claiming and at all times claimed that the policy was forfeited. It shows equally clearly that its defense, termed a waiver, abandonment and rescission of the contract, has no basis in

fact or never was thought of until suggested to the Company by its attorneys.

The Ninth Circuit Court of Appeals in passing upon a request for instruction which was denied in the lower court and which is similar to those plaintiff in error are insisting on as error under the above head, uses this language:

"There are several reasons why the court below was right in refusing to give this instruction. It will be sufficient to state one, and that is that is that the statute of New York prescribes the condition on which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not liable to be set aside or waived by the company, or the assured, or by both together. Society vs. Clements, 140 U.S. 226, 233; Hicks vs. Insurance Co., 9th C. C. A., 215; Griffith vs. Insurance Co., (Cal.) 36 Pac. 113; Warner v. Association, 100 Mich., 157."

Nixon v. Ins Co., 81 Fed. 796, 802.

The following authorities clearly support the rule as announeed above:

Hicks vs. Ins. Co., 9th C. C. A., 215; Griffith vs. Ins. Co., 36 Pac. 117; Mullen vs Ins. Co., 34 S. W. 605; Ins. Co. vs. Smith, 41 S. W. 680; Rowe vs. Ins. Co. 38 N. Y. S. 625; Carter vs. Ins. Co. 110 N. Y. 15, 17 N. E. 396; Phelan vs. Ins. Co., 113 N. Y. 147, 20 N. E. 827, Baxter vs. Insurance Co., 119 N.Y. 450, 23 N. E. 1048; McDougall vs. Assurance Society, 135 N.Y. 551, 32 N. E. 251; De Frece vs. Insurance Co, 136 N.Y. 144, 32 N. E. 556.

b

The courts have universally held that this statute and like statutes cannot be waived by the insured. We have

fully covered this argument supra, but will cite some of the authorities:

Griffith vs. Ins. Co., 36 Pac. Rep. 113.

Warner vs. Ins. Co., 100 Mich , 157.

Fidelity Ins. Co. vs. Ficklin, 74 Maryland, 172 on p. 185.

Ins. Co. vs. Clements, 140 U.S., 226, on p. 234.

Wall vs. Ins. Co., 32 Fed. Rep., 273.

Reilly vs. Ins. Co., 43 Wis., 4 Dill., 177.

Chamberlin vs. Ins. Co., 55 N.H., 249.

Emery vs. Ins. Co., 52 Me., 322.

White vs. Ins. Co., 4 Dill., 177.

c

The mere non-payment of a premium on the part of the insured cannot be construed as an abandonment of the contract. The premium was not due within the meaning of the statute until the statutory notice was served.

Baxter v. Ins. Co., 119 N.Y., 450, pp. 453–457.

DeFrace vs. Ins. Co., 136 N.Y., 144.

Griesener v. Ins. Co., 10 Washington, 202.

Ins. Co. vs. Mullen (Tex.) 34 S. W., 605.

To the same effect is the case of Ins. Co. vs. Hamlin, 139 U.S., 297. Almost any number of like cases might be cited where the contract stipulates for a notice as in the case of assessment societies. We have the first case to discover where a notice is required by statute or by express provision in the con-

tract, where the failure to pay the premium without the notice has been held to be an abandonment of the contract. The proposition is so plain as a matter of law that it needs no citation of authorities in its support.

d

No right of rescission could exist in plaintiff in error except by failure of Mr. Phinney to perform his contract.

The Company could recind the contract only in case of the non-performance of the contract (the non-payment of the premium) by Mr. Phinney; but we have already shown, no premium was not due on the contract until the statutory notice was served. The plaintiff in error admitted in open court that it did not serve the statutory notice. Record p. 190-2. Under this state of facts Mr. Phinney performed every act on his part which by the terms of the contract it was his duty to perform.

e

The plaintiff in error broke the contract by not permitting Mr. Phinney to pay the premium.

Though the plaintiff in error never placed Mr. Phinney in a position where it was his duty to pay a subsequent premium, yet, according to their own witness, Mr. Phinney did tender the second premium. This is shown by the correspondence of the company about the time it claims the second premium was due, which correspondence is in the following words:

Seattle, Washington, Dec. 10th, 1891.

A. B. Forbes, Esq.,
General Agent.

Dear Sir:

Your wire of the 9th inst. reading. "If tendered, decline acceptance September premium No. 422198 Phinney" duly received. This premium was tendered a few weeks ago but was refused by me as applicant is now a very bad risk.

Yours very truly,

F. L. Stinson.

Record, p. 188.

f

The plaintiff in error not only refused the premium but instructed its agents never to take the premium.

The plaintiff in error instructed its agents by telegram from its home office in the City of New York not to permit Mr. Phinney to pay the premium or to perform that part of the contract, though it had not placed him in default by serving the statutory notice.

"If tendered decline acceptance of September premium 422198" (the number of Mr. Phinney's policy.

g

No party to a contract can rescind until he has returned or offered to return all consideration he has received under the contract.

"The rule has been thoroughly established, that before one party can rescind he must place the other in *statu quo*.

Blackburn v. Smith, 2 Exch. 783, 18 L. J. Exch. 187; Beed v. Blandford, 2 Younge & J. 278; Pharr v. Bachelor, 3 Ala. 245; State v. McCauley, 15 Cal. 458; Christy v. Arnold (Ariz.) 35 Pac. Rep. 918; Shively v. Semi-Tropic Land & W. Co. 99 Cal. 256; Cleary v. Folger, 84 Cal. 316; Moore v. Bare, 11 Iowa, 198; Murphy v. Lockwood, 21, Ill. 611; Gehr v. Hagerman, 26 Ill. 441; Wheeler v. Mather, 56 Ill. 241, 8 Am. Rep. 683; Wolf v. Deitzsch, 75 Ill. 205; Colson v. Smith, 9 Indiana 12; Chance vs. Clay County Com'rs. 5 Blackf, 441, 35 Am. Dec. 131; Hendrickson v. Hendrickson 51 Iowa, 68; Johnson vs. Jackson, 27 Miss. 498, 61 Am. Dec. 522; Randlet v. Herren, 20 N.H. 102; Getchell v. Chase, 37 N.H. 110, Ayer v. Hawkes, 11 N.H. 148; Doughten v. Camden Bldg. & L. Asso. 41 N.J. Eq. 556; Pittsburg & N. G. Turnp. Road Co. v. Com. 2 Watts, 433.

Though insisting on a rescission of the contract, the plaintiff in error does not contend that it is within the above rule of law. It does not contend that it ever returned the first premium which it admits it received. How then can it claim that the contract was rescinded, or that it ever had any to declare a rescission. It would be doing Mr. Phinney's representative an injustice to permit the Company to retain the consideration of the contract and give him no benefit therefore. This is clearly shown by some voluntary testimony of Mr. Easton, the general secretary of the Company, as follows:

"On that date, September 24th, 1891, assuming that the age of the insured was 39 years, as I understand it was, the tabular contribution of the above mentioned premium to the reserve fund of the company was $1,903.80. Taking $1,905.80 as a single premium for temporary insurance, assuming that the policy was entitled to be kept in force for a certain time

after default in payment of one premium, the period of such extension would consist of 2 years and 36 days. The extension would there expire not later than Nov. 1st, 1892."

Record, p. 336.

The date, November 1st, 1892, above, should have been November 1st, 1893. The above quotation shows that this is an error either in the printing or the transcribing of the testimony. The original premium was $3,770. Record p. 3. This was divided by the insurance Company into two parts, $1866.20 which paid for the actual cost of carrying Mr. Phinney, for one year, or until Sept. 24, 1891; and the balance $1,903.80, the legal reserve which taken as a single premium for temporary insurance, would carry the policy two years and 36 days, or until November 1st, 1893, almost two months beyond Mr. Phinney's death.

h

None of the alleged facts which the plaintiff in error claims constitutes this defense were known by it but only by a party —not the agent of the company—at least for any such purpose. A part of it was only loaned for canvassing purposes.

Much of the testimony bearing upon this defense has just been set forth. We will here add the following as bearing directly on this point.

"Q. Now, later on you went up to borrow this policy of Phinney; went up to his office to borrow this policy?

"A. I don't know that I went to his office for that purpose it came up in a general conversation.

"Q. You did borrow it there? A. Yes, sir.

"Q. And you say that later on you went to the office and borrowed this policy! A. Yes, sir.

"Q. You told him it was forfeited and it was not any good to him, or words to that effect?

"A. Words to that effect; yes, sir.

"Q. And you were well acquainted with Phinney?

"A. Yes, sir

"Q. And a good friend of yours? A. Yes, sir.

"Q. Now you did't mean to tell him an untruth?

"A. No, sir.

"Q. Well, Phinney permitted you to take the policy?

"A. Yes, sir.

"Q. Did you ever return it to him?

"A. Not to my knowledge; I don't remember that I did.

"Q. What became of this policy? A. I don't know.

"Q. You havn't got it now? A. No.

"Q. You say that Phinney let you have this policy for canvassing purposes? A. Yes, sir.

"Q. You would not care to have a dead policy for canvassing purposes would you? A. It would not make any difference whether it was dead or alive.

"Q. You would not want to say that Phinney has a policy issued for a hundred thousand and it was such an expensive contract.

"A. That is part I should not state if I was canvassing. I show the contract.

"Q. For the purpose of soliciting you would let them understand that it was a live policy? A. Yes, sir.

We have already called the court's attention to the fact that the president of the Company, Mr. McCurdy, (Record, p. 183-4) the corresponding secretary of the Company, Mr.

Duncan, (Record, 310) and the general secretary of the Company, Mr. Easton, (Record, p. 328) all swore that they did not know Mr. Stinson; that he was not the agent of the Company, and had no connection with the Company. Of course plaintiff in error claims this is not true. It undoubtedly is true to the extent that he was not an agent with any general powers whatsoever. It is true they designated him as the agent upon whom summons might be served in the State of Washington, in conformity with the statute, and he was soliciting insurance. A clause in the policy reads as follows:

"Notice to the Holder of this Policy—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy."

There is no evidence that any of the above conversations were ever reported to the Company, or that they were informed that Mr. Phinney had loaned the policy to Mr. Stinson for canvassing purposes, or that the Company had knowledge of the facts other than the non-payment of a premium which it now claims as the basis of a waiver, rescission or surrender of policy.

It appears therefrom that the Company had not made any effort to secure a cancellation or surrender of the contract of insurance. That no negotiations were had with that end in view. The company had no knowledge of any of the facts which it now claims constitute a waiver, abandonment, recission or surrender of the contract. Mr. Stinson of Seattle alone had knowledge of these. The Company itself disowns Stinson, maintains that he was not its agent, and disclaims that he was employed to act in any

capacity for it. If this is true, and they say it is, his knowledge would not be their knowledge, and his act would not be their act. Not having any knowledge of such facts it could not act upon them. If the policy was given at all to Stinson it was given to him to be used for canvassing purposes—to him as a friend and individual, not for the Company. If it was given at all it was given for that purpose and no other. The contract itself contained a condition that has much bearing upon this point, which is as follows:

i

It is claimed that after the Company refused Mr. Phinney's tender of the premium, and had instructed its agent by a telegram from the home office not to accept the premium, that its agent secured an admission that the policy was forfeited, and that this constituted a waiver of the statutory notice.

This is directly contrary to the express terms and spirit of the statute, to the effect that a printed notice must be served before the policy could be terminated We have shown that all courts have held that the defense of forfeiture or waiver of forfeiture or anything akin to forfeiture was of no effect or force if there has been any departure from the strict terms or mode of forfeiture provided by statute. As soon as any other mode is recognized the statute is worthless to avoid the evil it was intended to cure. We are strictly within all the decisions of all the court when we say that the statute provided one method and one method only for forfeiting a contract of insurance and for proving such forfeiture. No other method of proof is recognized by

the statute. No other reason for this rule need be stated. It is sufficient to say, if we are right in saying it, that this is the sole method provided by statute, and there is every reason why the legislature should adopt such a rule. It doubtless recognized the fact that the party who would receive this notice, whenever the question arose, in most instances at least, would be dead; and if it permitted an insurance company, or the representative of an insurance company, to give evidence of a conversation with the insured it would be opening the door to the practice of fraud. There would be no way of meeting the evidence offered by the insurance company, because the party with whom such conversation was had would be dead and gone and the interest of the insured would be wholly at the mercy of the insurance agent. And even if the insured was alive at the time such a question arose, and it permitted an oral notice to be given, or permitted statements made orally to take the place of of the written notice, it would leave it in the hands of the insurance company to intentionally or unintentionally misrepresent what occurred; but if it required the company to given a written or printed notice containing such information, giving the insured thirty days to pay after the receipt of such notice, it left nothing to the frail recollection of the insurance agent; no misunderstanding could occur—no one could be misled. It is useless to suggest to a court of ripe experience in such matters that it was a wise precaution, and that its provisions ought not to be lightly set aside.

If Mr. Phinney admitted the policy was forfeited it was because he was ignorant of this statute of New York—ignorant of a fact—which admission would not bind him. This fact the plaintiff in error is conclusively presumed being the laws of its home state.

Mr. Pomeroy lays down the same rule: That "Mistake

of law constitutes a mistake, only when it arises from: 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or, 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify. *Mistake of foreign law is a mistake of fact.*."

Pomeroy, Eq. Jur, vol. II. sec. 839 on p. 300.

The leading authority on this part is a case decided by the Supreme Court of Massachusetts, and is in part as follows:

"That a mistake in fact, is a ground of repititon, is too clear and too well settled to require argument or authority in its support. * * * * The courts of this state are not presumed to know the laws of other states, or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them.

That the lex loci rei sitae must govern the descent of real estate, is a principle of our law, with which everyone is presumed to be acquainted. But what the lex loci is, the court can only learn from proof abduced before them. The parties knew, in fact, that the intestate died seized of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But they are bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proofs, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? Juris ignorantia est cum jus nostrum ignoramus, and does not extend to foreign laws or the statutes of other states.

We are of the opinion that, in relation to the question

now before us, the statute of New York is to be considered as a fact, the ignorance of which may be ground of repetition."

Haven vs. Foster, 9th Pickering, 112, on p. 129-130.

The Supreme Court of Washington has followed the above authorities using this language:

"But there is another principle of law which is conclusive in this case. The demurrer admits the fact that Bell was not a resident of the State of Washington, but of the State of Ohio, when this contract was made, and his mistake of the laws of this state is held to be a mistake of fact. Nor does the maxim that 'ignorance of law is no excuse of the breach for non-performance of an agreement' apply to foreign laws, or laws of other states of the Union. Ignorance of those laws is deemed to be ignorance of fact. King vs. Doolittle, 38 Tenn. 77. Ignorance of law signifies ignorance of the laws of one's own country, not ignorance of the laws of a foreign country. In this respect the laws of other states in the Union are foreign laws. Haven vs. Foster, 8 Pick. 111. To the same effect is Patterson vs. Bloomer, 35 Conn. 57; Raynham vs. Canton, 3 Pick. 293; Bank of Chillicothe vs. Dodge, 8 Barb. 233.

Morgan vs. Bell, 3 Wash., 554 on p. 576.

To the same effect are the following:

King vs. Doolittle, 38 Tenn. 77.

Samson vs. Mudge, 13 Fed. 260.

Norton vs. Marden, 15 Me. 45.

Patterson vs. Bloomer, 35 Conn. 57.

I. Story, Eq. Jur., Sec. 3rd, note 3.

Chilcotte vs. Dodge, 8 Barb. 233.

It would be a strange law that under these circumstances would hold an omission of forfeiture of any effect or force

against Mr. Phinney or his executrix. Mr. Phinney had evidently been and was very anxious to keep the policy alive.

Indeed, during this very transaction made an unsuccessfull attempt to increase his insurance by obtaining a policy in the Equitable, of which the agent was aware Without being placed in default he had tendered the premium. On the other hand the company was equally anxious that his policy should be terminated. The agent wrote the company he was a bad risk, and he had refused the tender of his premium. The company took the position at once that the policy had been forfeited the preceding September, and maintained that one position until long afterwards and up to the time it filed its answer in this case. In other words if the company was permitted to take this position and could successfully maintain it, it would reap the the benefit of its own fraud. Can there be any doubt (giving for the time being full credence to the evidence of plaintiff in error) that had Mr. Phinney known this policy was preserved intact by the law of New York he would never have admitted his policy was forfeited? His whole conduct showing as it does that he was anxious to keep it alive. Is it not clear that if he ever admitted the policy was forfeited that he did it because of his ignorance of the law of New York?—ignorance of a fact, which would not bind him or his executrix as soon as the mistake was discovered? Is it not clear that this mistake of fact was superinduced by plaintiff in error working through an agent who claimed to be his friend, and who assured him the policy was forfeited.

j

Mr. Phinney's executrix was not estopped from enforceing the contract. All the argument advanced by plaintiff in error to sustain the defense of waiver, abandonment and rescission is based on estoppel.

All the text writers agree that to establish the estoppel suggested by these requested instructions all the following elements must appear:

"1. There must have been false representation or a concealment of material facts.

"1. The representation must have been made with knowledge, actual or virtual, of the facts.

"3 The party to whom it was made must have been ignorant, actually and permissably, of the truth of the matter.

"4. It must have been made with the intention, actual or virtual, that the other party should act upon it.

"5. The other party must have been induced to act upon it. Bigelow on Estoppel, p. 570; Pomeroy, Eq. of Jur., 1st ed., sec. 805; Bacon on Ins., 2nd ed., sec. 420; May on Ins., 3rd ed., sec. 507, and case cited by the above authorities.

1. The above evidence shows clearly that Mr. Phinney did not conceal a material fact or make any misrepresentation. On the contrary the company did mislead Mr. Phinney. It told him his contract was forfeited when it knew it was not. It knew it had not served the statutory notice. It knew Mr. Phinney was ignorant of the statute as well as his rights under it.

2. Mr. Phinney did not make any representation of any fact. The company did all this.

3. The company was not ignorant of the facts. It knew the law of its own domicile. It knew it had not complied with the laws regulating forfeiture of such contracts. It knew Mr. Phinney was ignorant of the law and his rights under it. The law presumed he was ignorant of the law of New York: "Mistake of the law of another state is a mistake of fact." Pomeroy Eq. Jur. Sec. 839; Hoven vs. Foster, 9 Pick. 115.

4. As Mr. Phinney did not make any representation he did not deceive, and could not have had any intention to deceive.

5. Did the company act on any representation that Mr. Phinney made, or anything Mr. Phinney said, or anything Mr. Phinney refrained from doing? It certainly did not. The above evidence shows that on the 24th of September, 1891, the Company declared the policy forfeited. On or about Oct. 24, 1891, when Mr. Phinney tendered the premium it told him his policy was already forfeited. On December 10, 1891, without Mr. Phinney doing anything further or saying anything further after the tender, the Company telegraphed their agents not to accept Mr. Phinney's premium if tendered. If that telegram means anything it means that the company, on the day the telegram was sent, December 10, 1891, was standing on the ground that the policy had already been forfeited on September 24, 1891. The evidence clearly shows that it maintained that position, and that position alone, during the whole of Mr. Phinney's life, and long after this action was instituted. On January 28, 1892, the inspector of risks, Mr. Stark, in a report he made, reported adversely on Mr. Phinney as a risk, and ends this report with the very significant words "awaiting particulars."

On the 28th day of March, 1892, the second vice-president made an entry in the books of the company that the policy was "forfeited September 24, 1891, do not restore." When Mrs. Phinney informed them of the death of Mr. Phinney, and demanded payment of the policy, they replied it had been forfeited September 24, 1891, for non-payment of premium. The agent at Seattle wrote her to the same effect at about the same time. With full knowledge of all the facts all this time it took and maintained the position that it

was forfeited September 24, 1891. It maintained that position successfully against Mr. Phinney's tender of the premium. Would it have done differently if Mr. Phinney had declared to them the policy was still alive? Would it have sent him a notice, statutory notice, informing him that if he did not pay within 30 days from the service of the notice his policy would be forfeited, but that if he did pay within 30 days it would be taken in full compliance with the terms of his contract? It would not because that was the one thing it was making efforts to avoid. The telegram refutes any such contention. The telegram shows that they were exceedingly anxious to keep him ignorant of his rights and prevent his payment of the premium, and that they would not accept it on any terms, relying on their contention that it was already forfeited. It was seeking to prevent the payment of the premium, not its collection. If the Company were relying in the slightest on this alleged abandonment, rescission or surrender, why not some mention of it in all the correspondence between it and its agents? Why not some mention of it in its books or records? Would an actual bona fide surrender of so valuable a contract as $100,000 which it was anxious to have terminated be made and no record of it anywhere, and all the head officers be entirely ignorant of it? None of the officers in New York knew anything about it, nor the general agent who "had charge of all matters in the west?" He never heard of it. The only one who did know anything about it was a Mr. Stinson, of Seattle, who in the language of the president, had no relation whatever with the company, and did not in any manner represent it. Estoppel or waiver is founded upon deceit, and has its adjustification in the duty of the courts to prevent the accomplishmet of fraud. In all cases cited, and in all the

cases where the word is used that we have been able to find, in which the defence was estoppel, all the five elements above stated were present. Estoppel or its synonyms in law, abandonment, and waiver, are based on principals of equity in order to prevent one party from committing fraud upon another. To permit this defense to succeed would not only fail to prevent fraud but give the insurance Company the benefit of its fraud. As we have already said the company in this case was the party guilty of deceit, of false representation, and it did this knowing it was not speaking the truth, and with the intent to deceive. If Mr. Phinney ever did admit the policy was forfeited, his admission was brought about by their representation that the policy was forfeited, and by concealing from him the information that the State of New York required to be given by the printed notice. This statute was enacted to protect the policy holder. It effected a radical change in the ordinary contract of insurance. It presumed that the policy holder would be ignorant of the change it wrought and the benefit its conferred. It required the notice to be sent to policy holders which recited all the changes the statute enacted, and the rights it conferred.

Mr. Phinney very naturally would suppose his policy was issued in accordance with the laws of New York, not in defiance of them. If he examined his policy, which he is presumed to have done, he would have found by its provisions that it was forfeited on the day the premium was due, if it remained unpaid on that day. The policy itself was misleading, the company assuming therein the power to forfeit the contract contrary to the statute. Under these facts, under the law, it was the duty of the company to speak, to send the statutory notice which would give the

assured the knowledge of his right under the statute. Instead of that the company sent a party (a friend, too, of Mr. Pinney's) whom in one breath they say is their agent, and in the next say he is not, who insisted and contended that the policy was forfeited. This party being an expert in insurance matters, and being a friend of Mr. Phinney's as well, claims he succeeded in convincing Mr. Phinney that the policy was forfeited, and obtained an admission of that fact. The company knew that this statement was false. Mr. Phinney was surely ignorant of the law of New York which saved his policy for him This law presumed he would be ignorant of it.

The following quotations from decisions correctly state the rule.

"There is no question, of course, but that a court of equity cannot grant relief solely upon a mistake of law. But there was here more than a mistake. There was a surrender of legal rights intentionally induced and procured by a false representation as to the law governing the case. The defendant must be presumed to have known that it was liable for the whole loss and by falsely representing that under the law applicable to the case the policy was void, when in fact it was valid, it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject and to surrender to it his claim.

"This clearly constitutes fraud and there would be manifest injustice in upholding a settlement under such circumstances."

Berry vs. Ins. Co. 132 N. Y. 59 on p. 53-4.

Justice Elmer, in Phillipsburg Bank vs. Fulmer, 2 Vr. 55, said: "To constitute an estoppel in pais there must be an admission intended to influence, or of such a nature as will naturally influence, the conduct of another, and so change his condition as materially to injure him if the party making it is allowed to retract."

"The main purpose of the doctrine is to prevent fraud;

there can, therefore, be no estoppel without fraud, either actual or legal. Hence, to impart this virtue to a representation, it must be made by a person with knowledge of the truth, or, what is the same thing in legal ethics, by a person whose duty it is to know the truth, to one who is ignorant of it. And he must make it with the intention of influencing the conduct of another, or under such circumstances as to show that he had reason to believe, when he made it, that it would influence the conduct of another. Kuhl vs. Jersey City S. C. E. Gr. 84. He who seeks to take advantage of an estoppel, must show that he has been misled by the works or conduct of another."

Ins. Co. vs. Morris 31 N. J. Eq. 503.

"No person can be said to have waived his rights unless he understands that he is waiving them."

Kirby vs. Ins. Co., 13 Lea. (Tenn) 340 on p. 344.

To the lower effect are:

Berry vs. Ins. Co. 132 N. Y. 49 on p. 53-4.

Sanford vs. Stone 40 Pac. 609 on p. 614.

Ramsey vs. 64 Tex. 397.

Pomeroy Eq. Jur. 2 vol. sec, 812, 846, 847.

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If there is any evidence of estoppel it is against plaintiff in error and in favor of defendant in error.

The evidence shows that about ten days before the premium was due, Mr. Phinney called at the office of the Company to arrange for the payment of his premium. He requested the Company to accept his note for thirty or sixty days. That the agent refused to accept his note and requested him to get the cash. That he called a couple of days before it was due and again requested the agent to take his notes, but the agent informed him he could not do so, but asked him to get

the money. That he called again after the premium was due and a like conversation occurred. That he repeated this so many times within thirty days that the agent could not state the number, each time, the agent saying he should get the money. That finally he tendered the premium and the agent informed him for the first time that he could not accept the money without a certificate of heaith. Yet for thirty days after the premium was due he at all times led Mr. Phinney to believe that if he would secure the money he would deliver him the Company's receipt, never suggesting during that time that it would be also necessary for him to furnish a certificate of health. Both the agent and Mr. Phinney knew during this whole period that if a certificate of health was required Mr. Phinney could not furnish one. The agent wrote the Company about this time that Mr. Phinney had tendered the premium but that he had declined it on account of ill health, as Mr. Phinney was then a very bad risk. Fair treatment, honest dealing would have required the company to inform Mr. Phinney, after the alleged forfeiture, that it was no use to secure the money to pay the premium as his health would not permit his restoration. It is a rule of law too well settled to need citation that if a company recognized a policy as a continuing one after the right to declare a forfeiture exists it will be held to have waived such forfeiture. This the company did when it requested Mr. Phinney to get the "cash" to pay the premium, after the date of the alleged forfeiture.

IX.

IF THERE WAS ANY EVIDENCE TENDING TO SHOW AN ESTOPPEL, WAIVER, ABANDONMENT, OR RESCISSION AND SURRENDER OF THE CONTRACT, THESE MATTERS WERE SUBMITTED TO THE JURY, UNDER PROPER INSTRUCTIONS, AND THEIR VERDICT IS CONCLUSIVE.

We are sanguine that the defense of waiver, abandonment, rescission and surrender was wholly unsupported by the testimony and should have been withdrawn, by the court, from the consideration of the jury, but if our judgment is in fault in this respect, the plaintiff in error was certainly not prejudiced by the course pursued below.

The court below was of the opinion that the issue thus raised was a proper question for the jury to decide, and submitted the same and instructed specifically on the point. We submit that the instruction (if there was any evidence justifying its submission at all) is lucid, fair, comprehensive and impartial, and correctly states the law. The portion of the charge criticised by counsel for plaintiff in error embraces only a small part of the instructions on the point, and while we believe even this segregated portion accurately states the law, it is an elementry rule that a charge must be construed as an entirety, and when the completed charge on this point is considered it will be found that the lower court is not open to any criticism in this instance.

The entire charge on this point is as follows:

"Now, it is contended that Mr. Phinney and this company, acting through Mr. Stinson as its agent, arrived at an understanding and agreement that the policy should not continue longer in force; Phinney was to pay no more money, and that his rights and the policy were abrogated. Notwithstanding the provision of the statute of New York, that a provision in the policy itself waiving notice has no effect, and that the company can only forfeit the policy for non-payment of premium by mailing the prescribed notice, still it would be

competent and it was competent for the parties mutually to agree to the cancellation of a life insurance policy if they saw fit to do so. And the evidence in this case shows that Mr. Phinney did voluntarily, without being led by false representation or deceit to give up the policy, rescind the contract and give up the policy rather than to continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy so that it would no longer be a continuing contract. There is testimony in the case tending to prove that Mr. Phinney was unable to meet the second payment when it fell due, and by reason of his failure to make that payment, he voluntarily delivered up the policy to Mr. Stinson as an agent of the company, with the understanding expressed at any time, that it was lapsed, that it was no longer a continuing contract in his favor. If there was a full and fair understanding between these two men in that matter, and each relied upon that understanding, it would have the effect to determine the policy, and the company would have the right to consider itself absolved from any obligation to give the statutory notice in order to forfeit the policy because it would be unnecessary for the company to forfeit by legal proceedings what the opposite party had voluntarily relinquished. It is a question of fact, therefore, for you to determine from the evidence in the case, whether there was a full complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson, with that understanding and whether relying upon that understanding the defendant company subsequently acted."

Record, p. 352 and 354.

X.

PLAINTIFF IN ERROR REQUESTED THE COURT TO REPEAT THE VERY CHARGE OF WHICH IT NOW COMPLAINS, AND THUS MADE THE COURT'S CHARGE ITS CHARGE.

After the court had instructed the jury, and after each party had taken his exceptions, the jury retired to consider

its verdict. Thereafter it returned into court for further instructions in the form of questions, and asked the court with reference to the abrogation of the contract. The court thereupon answered the jury's questions, and thereupon counsel for plaintiff in error requested the court "to modify the instructions embodied in the jury's questions and the court's answer by a substantial repetition by the court to the jury of the instructions, which the court had heretofore given in regard to the abrogation of the contract of insurance, by agreement between the agent and the insurance." And it excepted to the refusal of the court to repeat the instruction of which it now complains. Record, p. 358, under Exception No. 35.

The categorical answers of the court to the further instructions requested by the jury, being clear, incisive and brief, were calculated to be easily retained in the memory of the jury. Counsel for plaintiff in error conceiving that it placed their client in an unenviable position, concluded to waive and abandon the exceptions theretofore taken to the court, and elected to adopt the instruction of the court as the child of its own creation, and theretofore, in open court solemnly requested that the first charge of the court be substantially repeated.

We submit that counsel could not have selected any more appropriate way of expressing its entire approbation of the charge than to have requested its repetition. The court proceeding upon the theory that a jury composed of men possessing the intelligence to frame the questions that they prepared and submitted to it, could be relied on to remember the instructions first given, refused to indulge in the idle ceremony of repetition. This affords no cause of complaint and cannot avail plaintiff in error. Counsel have

not the liberty in one breath to take exception to a charge and refusal to give requested instructions, and in the next breath and after further deliberation to request the court to repeat a charge and then say they were harmed by the charge given. Their exceptions were vague and general but their request to repeat was specific. It told the court as plainly as language could, that its first charge, in connection with its answer to the jury's question, was satisfactory to counsel. It claims now, that the charge with reference to the abrogation of the contract did it grievous harm. If that is true, would the court's repetition of it make it less grievous? Is it not clear that the charge as given was quite satisfactory to it until the jury brought in an adverse verdict?

CONCLUSION.

In the foregoing brief we think we have shown that the law of the case is overwhelmingly with the defendant in error. The plaintiff claims and insists that the second premium was not paid and that defendant in error is now seeking to enforce a contract that in good conscience she is not entitled to, because of the alleged failure to pay the second premium. We have discussed this case on the theory that plaintiff in error's contention is correct, though we have shown in our opening statement that there is much to show that in fact it was paid at the time the policy was procured. But still, admitting their evidence to be true, whose fault was it that the Company did not get the second premium? Did it ask it of Mr. Phinney in vain? Did he refuse to pay it? No. The only reason the Company did not get the premium is because it would not accept it. The agent wrote the Company that Mr. Phin-

ney "offered to pay, but in ill health". Later on he writes the Company, "This premium (Mr. Phinney's) was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk."

The home office instructed its agents by telegram, (could not wait for the slow carriage of the message by the mail,) "If tendered, decline acceptance September premium No. 422198 Phinney." Again we ask, whose fault was it that the Company did not receive the premium? This correspondence reveals that it was not seeking the premium, but was bending every effort to prevent Mr. Phinney from paying it, and was doing all within its power to obtain a forfeitmre of the contract. This is still more clearly shown by its subsequent conduct. About a month after it sent the above telegram its agent reported as follows:

"Date of investigation, Jan. 22, 1892.

"Remarks.

"Financially all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

"(Signed) STARK.

"Remarks:

"All right fin. but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

"(Signed) STARK.

"Awaiting particulars.

"A. *I produce here a book of the company, and the entries therein are as follows: 'Forfeited September 25th, 1891. Do not restore, second vice president, March, 1892.'*"

The plaintiff in error has not made and does not make any explanation of the above. It cannot be explained up-

on any other theory than that the Company was exceedingly anxious to obtain a forfeiture of the contract, and was not willing to accept the premium under any circumstances. The Company was aware that Mr. Phinney's days were few. It had its finger on his pulse, and it was beating slow and weak. The Company knew that if they accepted the premium, the whole policy would probably soon mature. They were much alarmed lest the agent should overlook the fact that Mr. Phinney was a bad risk and might give a few hours grace to save the forfeiture of his policy, which Mr. Phinney prized highly. His application for more insurance had just been denied on account of his physical condition, and he was anxious to keep his policy in force. They cut him off short without notice or warning, directly in the teeth of and contrary to the statute. They telegraphed their agent across the continent not to take the premium under any circumstances, and the agent triumphantly comes back with the answer that he has already refused it. It was to prevent such conduct that the statute was enacted, and it is of little avail if such defense can succeed. "Forfeitures are odious; they are often the means of great injustice and oppression, and courts will only enforce them when necessary."

It would have been a rank injustice had the company acomplished its object in attempting to forfeit the contract; but in its zeal and hurry to forfeit the contract, it overstepped itself in failing to comply with the New York statute, which was intended to acomplish this very object—prevent a forfeiture without timely notice and warning.

We mention that the decision of the circuit court of appeals dismissing the writ should be affirmed, and if this

Court should hold against us on that proposition, then the judgment of the circuit court should be affirmed.

Respectfully submitted,

STANTON WARBURTON,

Attorney for Defendant in Error,

A. F. BURLEIGH,

of Counsel.

No. 12.
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Clerk.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 12.

THE MUTUAL LIFE INSURANCE COMPANY,
PETITIONER,

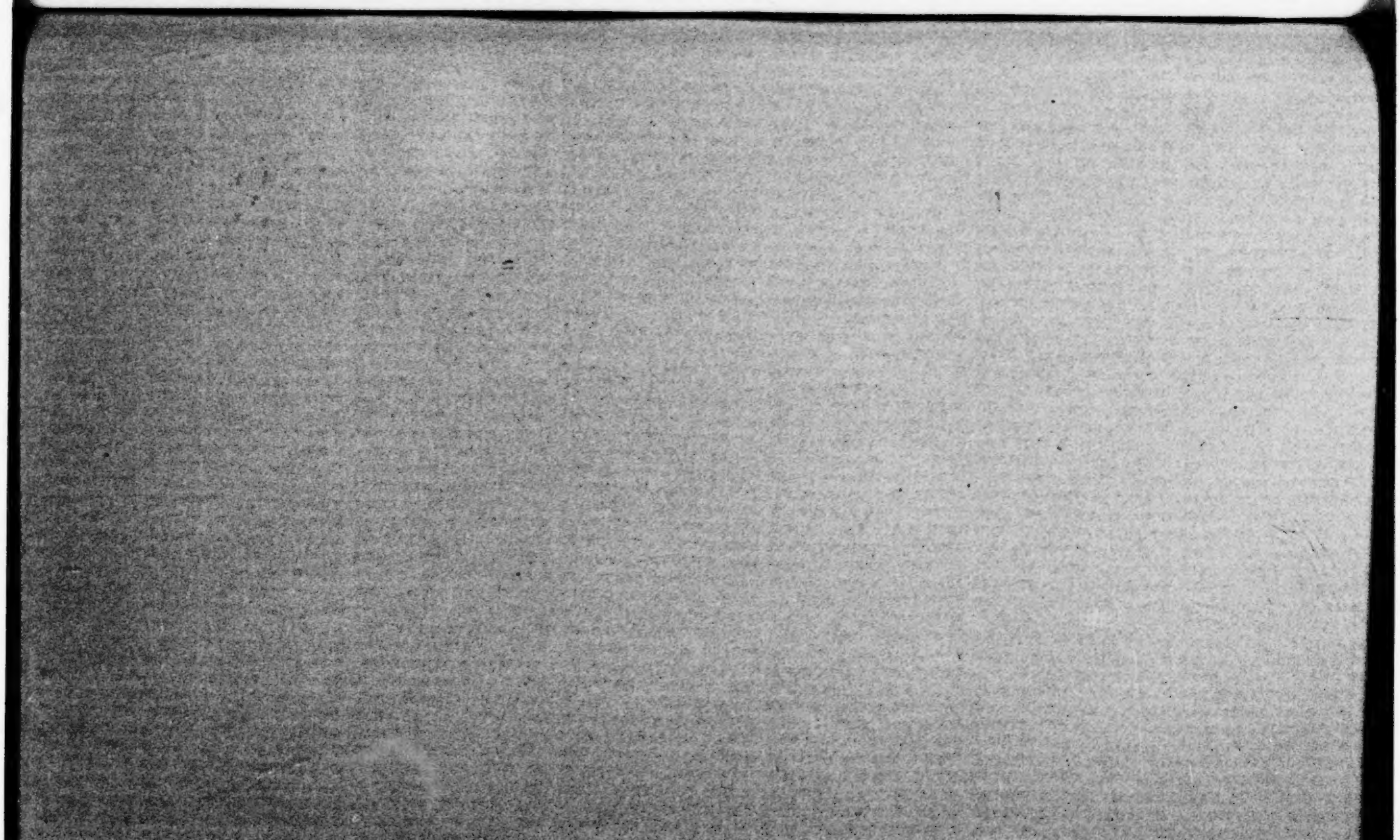
vs.

NELLIE PHINNEY, AS EXECUTRIX, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF.

S. WARBURTON,
Attorney for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-30-1900



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SUPPLEMENTAL BRIEF.

Defendant in error, about one year ago, at or near the time the case should have been called for argument had it not been continued, filed her original brief in this cause. The plaintiff in error has, in the last day or two, served its brief. To answer more fully some of the points discussed therein, and in order to give the court the benefit of some of the decisions announced since the printing of the former brief, the defendant in error files this her supplemental brief.

The statute of New York is a limitation on the powers of insurance companies organized by the State of New York.

We have argued the above question at length in the original brief. In view of the contention of the plaintiff in error that the highest court of New York has not decided that the statute of New York requires companies to send notices to non-residents of New York, and has not in effect decided that the said statute is a limitation on the power of the corporations of that State, I have examined the record of the case in Baxter *vs.* Ins. Co. in the office of the clerk of that court in Albany. We find their contention is not sustained by the record. In that case one Matteson, the insured, was a resident of the State of Pennsylvania for ten years prior to his death. While a resident of Pennsylvania, in 1884, he took out a policy of insurance in the Brooklyn Life Insurance Co. The policy was payable to his wife. Subsequently he died in the State of Pennsylvania. After his death his wife assigned the policy to one Baxter, presumably a resident of New York, between whom and the company a controversy arose over the policy. The company claimed the policy was forfeited by Mr. Matteson in his lifetime, on account of the non-payment of a certain premium. There was no proof offered by either party as to the service of the statutory notice, Mr. Baxter claiming that under this statute it was not necessary for him to prove that the company failed to serve the notice on Mr. Matteson, the company contending that it was. The court held that it was incumbent on the company to prove the service of this notice on Mr. Matteson, a resident of Pennsylvania, as a condition precedent to its right to defend on the ground of the forfeiture of the contract for non-payment of the stipulated premium. In so deciding the court uses this language:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New

York, and construed only according to the laws of that State. Aside from the provisions of the policy and under the general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877. This statute was a part of the contract in question, and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all of its terms and conditions had been actually incorporated into the policy."

Baxter *vs.* Insurance Company, 119th New York, 450.

We have printed as an appendix to this brief the record certified to by the clerk of the court of appeals. The court does not base its decision on the ground that the insured was a resident of New York. It could not, because Mr. Matteson was a non-resident, but based its decision on two grounds: 1. That the policy contained a clause to the effect that it should be construed and controlled by the laws of New York, just as the contract in this case does. 2. That even though that stipulation was not in the contract, the general principle we are contending for would prevail. In the face of this decision, how can counsel contend that the highest court of New York has not held that it was necessary to send the statutory notice to non-resident policyholders. This case alone meets fully the main argument of defendant in error for reversal.

The court of appeals of New York in the case of Carter *vs.* Ins. Co., 110 N. Y., 15, also held that a notice should be served on a resident and citizen of Georgia, the insurance company being chartered by the State of New York. Ordinarily, when controversies arise between New York corporations and residents and citizens of other States, they are settled either by the courts of the State wherein the citizen lives or by the United States courts holding terms in such State; but here are two leading cases where the application of this statute is in question, both holding it necessary to send notices to non-residents of New York.

The appellate court of Illinois in an elaborate opinion has recently held that the statute of New York is a limitation on the power of insurance corporations chartered by that State. The same contention was made by the insurance company in that case as this. The court says:

"Appellant's counsel contend, first, that the contract was consummated in this State, and therefore that the New York statute has no application; and, secondly, that even though it be conceded that the statute applies, the policy was declared forfeited in conformity with its requirements. The argument of appellant's counsel on the first proposition consists of the discussion of the question whether the contract of insurance is a New York or an Illinois contract, apparently assuming that if it is the latter the New York statute can have no application, it not being a part of the contract and the contract making no reference to it. In this assumption we cannot concur. The question is one of power in the appellant corporation, namely, whether it had power to declare the policy forfeited otherwise than as prescribed by the New York statute. The validity of the statute is not questioned, nor is it questioned that appellant did business in New York or that the policy is such as is within the prohibition of the statute."

The court then discusses the question at great length as to whether or not this statute is a limitation on the power of the corporation. It shows, by reason and in entire accord with the great weight of authority, that such is the case. We ask the court's most careful attention to this case. It discusses the question fully, and in a most able manner, it closes the discussion in these words:

"Our opinion being that the appellant is, by reason of the New York statute, powerless to declare a policy of insurance forfeited, otherwise than as therein prescribed, and that irrespective of the question whether the policy is a New York or an Illinois contract, a decision of the latter question is unnecessary. However, inasmuch as the application was forwarded to New York and there accepted, and the policy was there issued and returned to Chicago for de-

livery, and the premiums and the amount issued were, by the policy, expressly made payable in New York, authorities are not wanting in support of the proposition that New York is to be regarded as the place of the contract (Phinney *vs.* Mutual Life Ins. Co., 67 Fed. Rep., 493)."

Equitable Ins. Co. *vs.* Frommhold, 75 Ill., app. 43.

To the same effect is recent decision from California supreme court as follows:

"It is also claimed on the part of the appellant that there was a waiver of the notice by the plaintiff. There is nothing in the case to show a waiver. Besides, it has been held by the court in the case of Griffith *vs.* Insurance Co., 101 Cal., 627; 36 Pac., 113, that under the law in question in the State of New York, a forfeiture could only occur in the mode pointed out by such law.

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that, being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power, in the face of the law which has taken it away. The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Osborne *vs.* Home Life Ins. Co., 56 Pac. R., 616.

If the statute of New York cannot be waived by written stipulation. For the same reasons, and they apply with far greater force, it cannot be waived indirectly. No other method can be substituted for that provided by the statute.

The above proposition has been argued at considerable length in our original brief. We wish to add a little to the discussion therein contained. We think we have shown clearly, both by authority and by reason, that the statute cannot be waived in writing. And if not in writing, how otherwise? Does not the old mathematical as well as logical

rule that the greater includes the less still prevail? If the parties to the contract of insurance cannot agree in writing to waive a statute of New York—where there could be no misunderstanding as to what the agreement would contain, where the agreement could be open to but one construction, where there could be no doubt as to the intention of the parties, where the insured could not suffer from the willful or false testimony of the agent of the insurer as to what the actual agreement was, where, in event that the insured should die, the agent of the insurer could not testify away the rights of the representatives of the insured, where perjury or willful misrepresentation as to what occurred could not prevail—by what course of reasoning or logic can it be said that the parties can waive the statute orally? Where there may be a misunderstanding as to the actual agreement, where either party may go on the witness stand and give different versions of what was actually agreed upon, where one of the parties interested may willfully misrepresent the true agreement as it may affect his interest, and where to that extent there will be a reward for any perjury he may commit—where, in case of the death of the insured his representatives will be wholly at the mercy of the agent of the insurance companies. If it was wise and was the intent of the legislature to make it impossible for the parties by solemn agreement in writing to waive the statute on the ground of public policy, was it not still greater wisdom, and was it not the intent of the legislature to take from the parties the power of making an oral agreement which would be subject to far greater abuse? If the insured cannot waive the service of the notice in writing, and such an attempted waiver is void, then of course no estoppel can be based on such a void agreement, because the insurer could not be misled by an agreement which he was bound to know was void. He could not rely upon any such agreement. It could not be made with intent to deceive, and for the same reasons

the insurer could have no right to act or rely upon it. This being true, there is nothing upon which an estoppel can be based. Then it must follow, as night follows day, if estoppel cannot be based on the solemn declaration or agreement in writing, it cannot be based on any oral declaration or agreement.

We think no one can read the statute carefully, especially in light of the decisions upon it, or like statutes, but he will at once conclude that it was the intention of the legislature in enacting this law to establish by it a definite, fixed, and absolute rule for the forfeiture of insurance contracts; one that would be universal and not subject to be set aside; one that would enable the insurance company to enforce the forfeiture feature in entire accordance with the terms of the contract, making the method of service easy and proof of the service equally easy and simple. But, on the other hand, it made this method mandatory and exclusive. It took great pains in framing the provisions of the act to guard against any possible evasion of any of the rights and privileges conferred upon the insured by the act: (*a*) The notice must be in writing, not oral; (*b*), it must name the amount of the premium and the date of its payment; (*c*) it must contain words of warning; (*d*) it must be addressed at the last known post-office address; (*e*) it must have the postage prepaid; (*f*) it must give insured at least thirty days in which to prepare for and pay the premium. None of these things may be evaded. This notice may be served before or after due date named in the policy, but one or the other notice must be served, and—

"In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; *but no such policy shall in any case be forfeited* or *declared forfeited* or *lapsed* until the expiration of thirty days after the mailing of such notice." (See act.)

Such is the language of the act. If the *policy shall not be forfeited* or *declared forfeited* until thirty days after the service of the notice, could the admission of the insured that his policy was forfeited work that event? Can such an admission change the fact, it being admitted no notice was served? Could the insurance company claim it relied on such admission when it was bound to know that such admission was contrary to the fact. Such is not the decisions of the courts of New York.

"It is to be noticed that the statute not only says that no company shall declare a policy forfeited, but that no policy shall be forfeited. The allegation, therefore, not only lies as a basis of the declaration of the forfeiture, but the existence of the service of the notice is the foundation of the right to forfeit, and, for that reason, proof of it is absolutely essential. Under the statute as it then existed, therefore, it was not necessary for the plaintiff to prove the payment of the premiums, and proof that they were not paid would not establish the forfeiture of the policy, because, by the express provisions of the statute, the failure to pay the premium does not forfeit the policy."

Fischer *vs.* Ins. Co., 56 N. Y., § 262.

"The condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium within thirty days after notice. The statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium."

Baxter *vs.* Ins. Co., 119 N. Y., 450.

"The statute provides that in case such payment is made within the 30 days limited therefor it shall be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and declares that no such policy shall in any case be forfeited until the expiration of 30 days after the mailing of such notice. There is no pretense that this notice was given, but, on the contrary, the

argument of the defendant is to the effect that it did another thing which the statute makes equivalent thereto."

Phelan *vs.* Ins. Co., 113 N. Y., 147.

The court of appeals sitting in New York uses this language:

"We think the statutory provisions had not been fulfilled which were an indispensable preliminary to the right of the defendant to treat the policies as forfeited; and, this being so, the plaintiffs were entitled to enforce the policies, whether there had or had not been a waiver. * * *

"The policies, being New York contracts, were, of course, dominated by the statute respecting forfeitures, as completely as though the statutory conditions had been explicitly incorporated in them. The adjudications of the highest court of the State treat it as one which must be strictly interpreted in favor of the assured, and hold that the defense of a forfeiture through non-payment of premium is not availing to an insurance company, if there has been any departure on its part from the provisions of the statute in regard to notice (Carter *vs.* Insurance Co., 110 N. Y., 15; 17 N. E., 396; Phelan *vs.* Insurance Co., 113 N. Y., 147; 20 N. E., 827; Baxter *vs.* Insurance Co., 119 N. Y., 551; 23 N. E., 1048; McDougall *vs.* Assurance Soc., 135 N. Y., 551; 32 N. E., 251; De Freee *vs.* Insurance Co., 136 N. Y., 144; 32 N. E., 556)."

Hicks *vs.* Insurance Co., 60 Federal (C. C. A.), 692.

"In construing this statute, the courts of New York have held that no forfeiture of a life-insurance policy can occur unless the notice provided for in the statute has been given, and that the burden of showing such notice is on the insurance company, and that the insured is not considered in default of payment until, at least, 30 days after such notice is given; and, although the insured may in fact have failed to make any number of payments, he cannot be regarded in the light of the statute as in default, or as having failed to meet his obligation, until 30 days after such notice is given."

Mullen *vs.* Mutual Life, 34 S. W. (Tex.), 605.

"There are several reasons why the court below was right in refusing to give this instruction. It will be sufficient to state one, and that is that the statute of New York prescribes the condition upon which a policy may be forfeited for the non-payment of a premium. The statute is mandatory and controls the contract. Its provisions are not subject to be set aside or waived either by the company or the assured, or by both together."

Nixon *vs.* Ins. Co., 81 Fed. (C. C. A.), 802.

The above authorities are supported by the following decisions:

Carter *vs.* Ins. Co., 110 N. Y., 15;
De Frace *vs.* Ins. Co., 136 N. Y., 144;
Schad *vs.* Ins. Co., 42 N. Y. S., 314;
Merriam *vs.* Ins. Co., 18 N. Y. S., 305;
Griffith *vs.* Ins. Co., 101 Cal., 621;
Warner *vs.* Ins. Co., 100 Mich., 167;
Osborne *vs.* Ins. Co., 67 Pac. (Cal.), 605;
And numerous other authorities found in this and the original brief.

We maintain that one of the many reasons that prompted the legislature to make the method of forfeiting insurance contracts provided by it the sole and exclusive one, was that policies of insurance only terminate by the death of one party, and it would be unfair and unjust to permit declarations, statements, or oral agreements of the deceased to be substituted for the statutory notice.

The statute which requires the insurance company to serve a specified printed notice instead of oral notice was formulated in part on the true theory that in most cases where controversies would arise over the forfeiture insurance policies under it, the insured would be dead. The notice would speak for itself. It would tell just what oc-

curred. It would not state one thing and mean another. It would convey to the insured the information the legislature thought he ought to have.

But if, on the other hand, it permitted an oral notice to be given or an oral waiver of the notice, or permitted alleged admissions of the insured to take the place of the written notice, it would be giving an unfair and enormous advantage to the insurance company.

The dead could not be called back to life to tell his side of the story. It would leave his representatives wholly at the mercy of the agent of the insurance company. There would be no way to meet such testimony. Every incentive would thus be given to relate only what was beneficial to the one party, and conceal everything to the advantage of the other. To give one side such an advantage would be unfair, unjust. This statute, we maintain, is not susceptible of any such construction. In construing this statute it must be borne in mind all the while that its purpose is protection to the insured.

There is every reason for this rule that there is for that rule established by statute in nearly all States, that no party to an action against the representatives of a deceased party shall be permitted to testify as to what took place between the decedent and such party. All courts have upheld such statutes and enforced them rigorously, as strongly suppressive of fraud. If such a defense as this may be upheld, the statute is of very little consequence, and insurance companies whose agents are of easy conscience can always successfully defend, though they may have violated every essential feature of the statute. Can this court suggest a case where such a defense would not be urged if such a proposition is once established? No court has so far sustained such a defense. On the contrary, they have held the companies to strict compliance.

No premium after the first is due on a contract of insurance under the New York statute until thirty days after service of the statutory notice.

It has been decided over and over again, both by the court of appeals of New York and the lower court, that no premium is due after the payment of the first until 30 days after service of the statutory notice. No policy-holder is in default, he loses no rights under his contract, until he fails for 30 days after the service of the notice to pay the stipulated premium. He has a perfect right to wait until the service of the notice before paying the premium. The company can exact it whenever it chooses to do so on or after the due date in accordance with the contract. It has no legal or moral right to complain about the policy-holder not paying any premium if it fails to serve the notice. The remedy is at all times in its hands. The Stratham case decides nothing more than the insurance company must have the power to cut off unprofitable members. This it has under the New York statute. If it does not do so, it cannot complain about any one but itself. If it does not get the permium or secure the right under the contract to declare forfeited the contract, it simply fails to exercise its power and privilege under the statute. The Baxter case, the Carter case, the Phelan case, decisions of the highest court of New York, had so construed the law before the Phinney contract was made. The Griffith case, in the California supreme court; the Griesemer case, in the supreme court of the State of Washington; the Hicks case, in the circuit court of appeals of the United States sitting in New York, had been decided prior to Mr. Phinney's death.

"The statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after

notice is to be taken as a full compliance with the conditions as to payment of premium. *In the absence of proof, on the part of the defendant, as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and the statute when read together.* Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential to put the insured in default, or raise any point based on his omission to pay the last quarterly premium."

Baxter *vs.* Ins. Co., 119 N. Y., 450.

"The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it became necessary to consider the question of the sufficiency of the notice served."

De Frace *vs.* Ins. Co., 136 N. Y., 144, on p. 151.

"The statute, however, imposed the duty upon the defendant of sending the notice to the plaintiff in a particular manner, and when it did so it acquired the right to declare a policy forfeited for the non-payment of the stipulated premiums. It was, therefore, incumbent upon the defendant to show that it had complied with the terms of the statute, and it did not do this by showing a delivery of the notice to another person than the plaintiff. Such notice gave it no right to declare the policy forfeited, and in so doing it acted illegally."

Carter *vs.* Ins. Co., 110 N. Y., 15, on p. 23.

"To that extent the express conditions of the policy were altered by the provisions of the statute. This alteration not only worked this change in the absolute right of the parties, but it made a very considerable change as to the proof necessary to be offered by the plaintiff to entitle her to recovery upon the policy. The effect of the statute was that after a policy had once been issued, no act of the insured, by way

of omission to pay the premium, could of itself work a forfeiture of the policy. So far as it was concerned, the contract was a permanent one until some act of the defendant had been done by way of putting an end to it."

Fischer *vs.* Ins. Co., 56 N. Y. S., —.

"In this view of the case it is not necessary to consider the other questions raised. If the proper notice was not given, the assured, at his death, was not in default, and the defendant has no defense to the action."

Shad *vs.* Ins. Co., 42 N. Y. S., 314.

Overruled cases cited by plaintiff in error on question of waiver of the statute of New York.

The case of Insurance Co. *vs.* Curray, relied upon so confidently by plaintiff in error, was distinctly overruled in the case of Ins. Co. *vs.* Rudwig, 80 Ky., 223, on page 235, as follows:

"And when parties have entered into an insurance contract since the adoption of this statute they must be held as contracting with reference to the statutory provision, and, we might add, subject to a like rule, recognized by this court regardless of the statute, and therefore that portion of the opinion in the case of the Farmers' and Drovers' Bank against Curray, expressing a contrary view, is overruled."

The cases of Desmazes *vs.* Ins. Co., 7 Fed., 529, and Caffery *vs.* Ins. Co., 27 Fed., 25, both relating to the law of Massachusetts passed in 1861, and holding to the effect that that statute could be waived, are specifically disapproved of in the case of Holmes *vs.* Ins. Co., 131 Mass., at page 64. They are cited also with disapproval by Judge Dillon in the case of White *vs.* Ins. Co., 4 Dill., p. 177; also in the case of Griffith *vs.* Ins. Co., 101 Cal., p. 627; also, I think, in the case of Ins. Co. *vs.* Rudwig, 80 Ky., 223, on the ground that

they were contrary to the great weight of authority. They are surely contrary in principle to the case of Clement *vs.* Ins. Co., 140 U. S., 226. The other cases cited on this proposition are so clearly not in point that we shall not discuss them.

The statute in question does not cover the statute relative to reserve, but both work in entire harmony.

The company urges with considerable zeal that it was the purpose of the legislature in enacting the law to protect from forfeiture such portion of the policy as the premiums had already purchased. If such was the intention of the legislature, it knew but little about the English language when it enacted the law.

1. If that had been the intention of the legislature, it would have used language appropriate to express such an intent.

2. The language of the act is susceptible of no such construction.

3. No assignment of error was made touching this point, and nothing is in the record upon which such a claim can be based.

4. The legislature did pass a law on the 21st day of May, 1879 (chapter 347, Laws of the State of New York), which explicitly covers and protects the policy-holder as to the reserve on his policy. The two statutes work together in entire harmony, and the one does not cover the evil protected by the other.

The Cohen and Hill cases were decided correctly by the lower court, if this court holds that a contract like Phinney's was a New York contract, and that the printed waiver in the policy is of no avail. This is admitted by plaintiff in error in its brief.

The place of performance of the contract in each of those cases is New York. The stipulation in each contract that the application is made subject to the charter of the company and the laws of New York is identical with this case. The brief of plaintiff in error (p. 143) contains the following:

"This (its defence of waiver, estoppel, etc.) might not apply to cases where one has insured his life for another's benefit, for, as was said in Griffith *vs.* Ins. Co. (101 Cal., at p. 638) 'the doctrine is well settled that when a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance on his own life, payable to another, the insured cannot surrender the policy without the consent of the beneficiary.'"

This language is almost verbatim the language of this court in the case of Washington National Bank *vs.* Hume, 128 U. S., 206, which it cites with approval.

Then if the court holds that under like facts the Phinney contract is a New York contract and the printed waiver is of no force, the application for writs of certiorari should be denied in both the Cohen and Hill cases, now on application before this court for writ of certiorari.

The New York statute of 1897 does not affect the cases of Sears vs. Ins. Co., nor Cohen vs. Ins. Co.

There are many reasons why the statute of 1897 has no effect on the Sears or Cohen cases:

1. That part of the statute of 1897 relied upon (if in a proper case it is susceptible of the construction claimed) is

in effect a statute of limitations. It is a rule of law, without any exceptions, that if a party to an action intends to assert or claim a right under a statute of limitations, he must set it up and claim it by special plea in the trial court. The statute of 1897 was never referred to in the pleadings; it was never claimed in any manner in the trial court.

2. In the original assignment of errors none are based on the statute of 1897. It is a rule of practice as old as this court that it will not review any error not so assigned.

3. Plaintiff in error did not only fail to assign any error predicated on the statute of 1897, but failed to assign any such error in its brief filed in the circuit court of appeals. It made no such claim in the argument before the circuit court of appeals, hence no such proposition was in any manner presented to the circuit court of appeals.

4. The first time and first place in the Cohen and Sears cases that the statute of 1897 was referred to or any claim made under it was in the petition for the writ of certiorari in this court and in its brief in support of the application. So, if those cases were before this court on their merits, either on writ of certiorari or writ of error, this court would not consider, and could not consider, any claim made relative to the law of 1897.

5. The statute of 1897 could not affect the Cohen case under any possible construction that could be placed upon it because Mr. Cohen died in September, 1897; so, no matter what month the law of 1897 went into effect, it was in force less than a year before Mr. Cohen's death, and that event would at once fix and determine the rights of the parties on that contract.

Mr. Sears died in March, 1898, so if the law of 1897 went into effect and force in 1897 in any month subsequent to

March, for like reasons it could not affect Mr. Sears' rights under the contract.

We have not been able to learn the date this act went into effect, but it is not a little remarkable that plaintiff in error did not somewhere in his brief state the date.

6. The contracts in both the Sears and Cohen cases were made subject to the charter of the company and the laws of New York as they then existed. The company would have that stipulation now read that the contract was made subject to the laws of New York as they might be in force at the time any action was begun on the contract, or that the contract was made subject to the laws and any amendments the legislature might thereafter make.

This whole contention of plaintiff in error seems to us absurd. If its contention be true, a contract is to be construed, not by the law covering the contract at the time it is made, but at the time any controversy might arise concerning it. In other words, the rights and obligations of the parties to a contract would change from year to year as the law was amended or changed.

The plaintiff in error practically admits that in cases where the reserve is large the rule it is contending for ought not to prevail.

Plaintiff in error in this brief, on page 102, undertakes to distinguish Carter *vs.* Insurance Co., 110 N. Y., from this case on the ground that in that case there was a tender of the premium by the assured a few days subsequent to the time it became due under the terms of the policy; but, as we have shown, Mr. Phinney tendered the premium in this case within 30 days from the time it was due. The plaintiff in error declined to receive it, on the ground that the policy was forfeited. We can see but very little difference on that point between the Carter case and the present

case. The plaintiff in error, in speaking of Phelan *vs.* Ins. Co., 113 N. Y., says:

"In that case the premium was due on December 30, 1892, and was paid before it was tendered to the company, about two o'clock, on Jan. 15, 1893, just 15 days after it became due. But it was refused. The assured died on the night of that day. It was held that the policy was in force. In the Phelan case a defective notice was served; in the Phinney case no notice was served, yet Mr. Phinney tendered the premium as effectively as did the representatives of Mr. Phelan."

Continuing, the plaintiff in error further says:

"Appplying this familiar principle to the Phelan case, the decision of the court illustrates the true function of the statute. Here was a case where there was large accretion of premium in the hands of the Insurance Co.; here was a default in the payment of the premium, and within a very reasonable time a discovery of the default and an attempt to place the policy-holder right again with the company and a tender of the premium with that end in view."

This language also applies with like force to this case. The attorneys for the plaintiff in error would have the court understand that if there had been a number of premiums paid on the Phinney policy, and consequently a large amount of accretions or reserve accumulated, it would not be here defending in this case.

Not over six weeks ago this same plaintiff in error applied for a writ of certiorari in the case of Cohen. That was a controversy over a semi-endowment insurance policy issued by it and upon which eight years' premiums had been paid, and yet the company likewise defend against the payment of that claim, and in the Cohen case accretions were much larger because it was a semi-endowment contract. We show in that case that these accretions on $3,000 would amount to a sum sufficient to buy a $1,000 policy fully paid, or it would have

purchased extended insurance for the full face of the policy for several years beyond Mr. Cohen's death. At the same time the company applied for writ of certiorari in the case of Sears *vs.* Plaintiff in Error. That was a 10-pay life policy, on which two and one-half years' premiums had been paid. In that case the accretions and accumulations would be very large—in other words, Mr. Sears had paid one-fourth of the amount necessary to purchase a $10,000 life policy.

Yet this company has fought both these cases through the circuit court and circuit court of appeals, and has applied for a writ of certiorari in this court.

Suppose in the Baxter case the company had secured an admission of the insured (contrary to the fact) that the policy had been forfeited, would the insured by that admission have lost all his valuable rights under his contract? Would the insured in that event and by that admission have lost either his right to pay the premiums whenever notice should be served by the company, or would that admission have given the company the right to forfeit that right to pay, as well as the "accretions" which under the New York statute he could use six months after default to purchase extended or paid-up insurance? This, too, contrary to and in the teeth of the statute which provides that such a policy "*shall not be lapsed or forfeited*" or by the company be "*declared lapsed or forfeited*" until thirty days after the service of the statutory notice, and if payment is made in the thirty days limited, it shall be taken in full compliance with the contract as to payment of premiums. Suppose Mr. Phinney had paid 18 out of the necessary 20 premiums to obtain a fully paid-up policy of $100,000, and had permitted the due date of the premiums to go by without payment, and thereafter had admitted that his policy was forfeited, even though the notice was not served, and under the New York statute his policy was fully in force, would he by that wrongful admission lose his right to a

fully paid $90,000 policy? To state the position is to answer it in the negative.

The company could well afford to take the chances it did in this case. In fact, it took no chances. It had made up its mind Mr. Phinney's days were few—that he would live out but a small part of his expectancy. As Mr. Davies said in his oral argument, the company knew Mr. Phinney was going to die soon. It had been notified by two letters that Mr. Phinney had tendered his premium, and it knew that if it served upon him the statutory notice or gave him an opportunity he would pay the premium which would bind it. They claim he admitted the policy was forfeited. If they could keep him or he should remain in that state of ignorance until the statute of limitations run, they would escape liability. On the other hand, if he became aware of his rights, or his representatives should, still the company would lose nothing. Why? Because when its liability would be enforced it could deduct unpaid premiums at six per cent. interest. If Mr. Phinney paid them, the company could only earn about five per cent. (the amount it earns on its investment) on the premiums thus paid. To pursue the course it pursued it had every element of advantage in its favor and none of disadvantage.

It is in just such cases as this where the insurance companies fail to send notices. Would not the insurance company have sent the statutory notice if it had been convinced he could not or would not have paid the premium?—the easiest and simplest way to have terminated the contract in its favor. Certainly it would. But it knew the contrary; it knew Mr. Phinney had made a tender and would pay his premium if given the opportunity. It had telegraphed across the continent to its agent not to accept his premium if tendered.

It was not necessary for the defendant in error to plead or prove the statute of New York, the courts of that State holding, as we have shown, that no premium is due or payable until the service of the notice, and that the burden of proving the mailing of the notice and the non-payment of the premium is upon the insurance company.

We have already shown in both the original brief and in this brief, *infra*, that our pleading is in entire accord with the decisions of New York and Washington—in fact, our pleading is almost identical to that of Baxter *vs.* Ins. Co.—and we ask the court to compare our complaint in this case with the complaint of the Baxter case, which may be found in the appendix.

This form of pleading is sustained by the following authorities:

Baxter *vs.* Ins. Co., 119 N. Y., 450.
De Frace *vs.* Ins. Co., 136 N. Y., 144.
Fuscher *vs.* Ins. Co., 56 N. Y. S., 262.
Griffith *vs.* Insurance Co., 101 Cal., 621.
Nixon *vs.* Insurance Co. (C. C. A.), 81 Fed., 796, 802.
Griesmer *vs.* Insurance Co., 10 Wash., 202.
Warner *vs.* Insurance Co., 100 Mich., 167, 159, 160.
Osborne *vs.* Ins. Co., 67 Pac. (Cal.), 616.
Ins. Co. *vs.* Mullen, 34 S. W., 605.

It is a rule of law as old as the courts of the United States that it is unnecessary to aver or prove the laws of any State of the Union. It is only necessary to show that a contract is governed by the laws of a particular State, and then plead the facts that would entitle the pleader to recover if the action was brought in the courts of such State.

In this case defendant in error averred that the plaintiff in error was incorporated under the laws of New York. She further alleged in paragraph II that the defendant made, executed, and delivered in the city of New York and State

of New York a certain contract or policy of insurance. It then sets forth the policy *hac verba*, which provides the company shall pay its contract of $100,000 in the city of New York. The insured is to pay all the future premiums in the city of New York. The policy recites that it is executed in New York; that proofs of death are to be submitted to it at its home office in New York.

In paragraph III she further alleges "that the application contained the agreement that it *was made subject to the charter of the company and the laws of the State of New York.*" It shows the plaintiff was relying on the contract and all the laws of New York that were operative on a contract of such nature. We have shown that we followed, in pleading our case under this law, the rule as settled by the highest courts of the State of New York on similar contracts. It is very evident that plaintiff in error so understood the pleading in page 3 of its complaint (Record, p. 36). It alleges: "that defendant is informed and believes that plaintiff relies upon an alleged non-compliance by defendant with the laws of the State of New York for the year 1876; chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321, and upon the construction of the said law as claimed by the plaintiff," etc. (p. 36, paragraph 3).

It is very evident that plaintiff in error was not misled as to our "alleged" cause of action. It understood perfectly that we were relying upon this statute of New York as it had been construed, and that our pleadings were based upon that theory. Its answer was drawn upon that theory, and upon none other.

It would be hard to conceive of a pleading in which more facts are stated showing that a certain contract was wholly governed by the laws of a particular State. We have shown heretofore that these facts being admitted, this court is bound as a matter of law to pronounce it a New York contract. Having plead the facts showing it to be a New York con-

tract, we can claim the benefit of any New York law which is to our advantage.

This court recognizes this long-standing rule. Having averred facts in our complaint showing that our contract was governed by the laws, and having stated all the facts that would have been necessary if we were suing on the contract in the New York courts, it was not necessary to plead or prove the statute. The following authorities clearly support this:

"There was no error in not allowing the statutes of limitation of New York and Illinois to be offered in evidence, after the court had overruled the motion of the defendant to be allowed to plead them as a defense. The only way in which such statutes are available as a defense is when they are at the proper time specially pleaded (1 Chitty on Pl., 514, 515; Stephen on Pl., 76, note; Wilson *vs.* King, 83 Ill., 232).

"With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only to be said that the courts of the United States take judicial notice of all the public statutes of the several States."

Gormully *vs.* Bunyan, 138 U. S., 623.

"In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every State of the Union, *because those laws are known to the court below as laws alone, needing no averment or proof.* Course *vs.* Stead, 4 Dall., 22, 27 (4 U. S., bk. 1, L. ed., 724, 726)."

Hanley *vs.* Donohue, 116 U. S., 1–6.

In the still earlier case of Lamar *vs.* Micou, 114 U. S., 218, the same court announces the same rule as follows:

"*The law of any State of the Union, whether depending upon statutes or upon judicial opinion, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof* (Owings *vs.* Hull, 9 Pet., 607; Bennington *vs.* Gibson, 16 How., 65; Draw Bride Co. *vs.* Sheperd, 20 How.,

227; 61 U. S., bk. 15, L. ed., 396). And nothing has now been adduced tending to show that as applied to the facts admitted by the parties, either the law of Georgia or the law of New York was other than we have held it to be.

"The Federal courts take judicial notice of the laws of all States, and it is only necessary that the pleadings show a state of facts to which any statute will apply, and the statute will be taken into consideration without averment or proof."

L'Engle *vs.* Gates, 74 Fed., 513.

Mr. Justice Story, speaking for the same court, in Owings *vs.* Hull, says:

"We are of the opinion that the circuit court was bound to take judicial notice of the laws of Louisiana. The circuit courts of the United States are created by Congress, not for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union, in cases to which they respectively apply. The judicial power conferred on the General Government by the Constitution, extends to many cases arising under the laws of the different States. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. This jurisprudence is, then, in no just sense, a foreign jurisprudence to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; *but it is judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.*

Owings *vs.* Hull, 9 Pet., 607, on p. 625.

"And in further affirmation of the doctrine here laid down we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several States of this Union, and that with respect to these *nothing is required to be specially averred in pleading which would not be so required by the tribunals of those States respectively.*"

Pennington *vs.* Gibson, 16 Howard, 65.

What facts did we not aver that it would have been necessary to aver if we had begun this action in the courts of New York? (See Baxter case, De Trace case, *et al.*) None can be shown. The ninth circuit court of appeals in a case identical with this, so far as the pleadings were concerned, the same contention being made as here, disposes of it in these words:

"In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this: that the plaintiff's right of recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance. The cause of action set out in the complaint was based upon the identical facts upon which the court gave judgment. There was therefore no departure in this case either from fact to fact, or from law to law, and hence the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several States. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense."

Ins. Co. *vs.* Hill, 97 Fed., 263, on p. 269.

To the same effect are the following:

Gordon *vs.* Hobart, 2 Sumn., 401.
Woodworth *vs.* Spaffords, 2 McLean, 168.
Jasper *vs.* Porter, 2 McLean, 579.
Jones *vs.* Hays, 4 McLean, 521.
Mewster *vs.* Spalding, 6 McLean, 24.
Merrill *vs.* Dawson, Hempst., 563.
Harpending *vs.* Reformed Dutch Church, 16 Pet., 455.
Covington Draw Bridge Co. *vs.* Shepard, 20 How., 227.
Beatty *vs.* Knowler, 4 Pet., 152.

United States *vs.* Perot, 8 Otto, 428.
U. S. *vs.* Turner, 11 How., 663–668; 13, 856–'9.
Chever *vs.* Wilson, 9 Wall., 108–'19, 604.
McNeil *vs.* Holbrook, 12 Pet., 84.
Christmas *vs.* Russel, 5 Wall., 302.
Ellwood *vs.* Flanigan, 104 U. S., 562.

The entire argument of plaintiff in error upon this point is based upon the decision of the Supreme Court of the United States in the case of *Union Pacific Railway Co. vs. Wyler*, 158 *U. S.*, 285, in which Wyler commenced an action in the *State court* of Missouri, alleging that while at work for the railway company in Kansas he had suffered a personal injury through the negligence of the company in employing an incompetent fellow-servant with previous knowledge of his incompetency. The complaint contained no allegation of negligence on the part of the fellow-servant, but was confined, as above stated, to an allegation that the negligence was that of the company in employing an incompetent fellow-servant. There was in force at the time a Kansas statute making every railroad company liable for damages done an employé in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés. The case was removed to the circuit court of the United States for the western district of Missouri, where an amended complaint was filed, which eliminated the charge of incompetency on the part of the fellow-servant and the averment of knowledge of such incompetency on the part of the railway company, and in which the plaintiff rested the cause of action exclusively upon the negligence of the fellow-servant, averring that the company was liable therefor by virtue of the provisions of the Kansas statute. The amended complaint was filed more than five years after the happening of

the accident. To the amended petition the company pleaded the statute of limitations of Missouri, which bars actions for personal injuries after five years. The question before the court was whether the amended petition set up a different cause of action than that alleged in the original petition, for if it did the commencement of the new action was to be regarded as dating from the filing of the amended petition, and therefore the bar of the statute would apply.

The inapplicability of the principles announced by the Supreme Court of the United States in this case can be best pointed out if we test the Missouri case by the case at bar.

If the Missouri case had been brought originally in the Federal court, as was this case, and the original complaint had alleged that the injury was caused the plaintiff while working for the railway company in Kansas by the negligence of the fellow-servant, it is entirely clear not only that the case would have been decided otherwise if the question was raised, but also that such a question would never have been raised in the case. In the case at bar the plaintiff states the making of the contract of insurance, the payment of the first premium, and the terms of the application upon which it is based, to wit, that the application is made under the charter of the company and the laws of the State of New York, and the further fact that the policy expressly provided that the application should be deemed a part thereof and of the contract of insurance. The allegation of these facts brought into the case the statute of New York. The statute was a public statute of said State, and there is at this day no question but that the Federal court sitting in Washington takes judicial notice of the public laws of New York without averment or proof thereof, and that it is not only unnecessary but poor practice to set out any such public statute in a pleading. Having pleaded a contract of which the general laws of the State of New York were made

a part by the terms of the contract, either party to the action was at liberty to claim upon demurrer, or at any other stage in the case, or by any other method, the benefit of any New York statute which was to his advantage.

We respectfully submit that the circuit court of appeals should be affirmed in its judgment dismissing the writ. If this court holds against us on that contention, we maintain that the judgment of the circuit court in all things should be affirmed.

Respectfully submitted.

S. WARBURTON,
Attorney for Defendant in Error.

APPENDIX.

STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, William H. Shankland, clerk of the court of appeals of the State of New York, do hereby certify that I have compared the annexed copies of the complaint, case, and exceptions, and Exhibit A in the case of John T. Baxter, respondent, against The Brooklyn Life Insurance Company, appellant, with printed copies thereof taken from the case and exceptions submitted on the argument of said case in the court of appeals on the 29th day of January, 1890, and now bound up and contained in volume No. 8 of cases and points for the year 1890, and that the same are true copies of the printed copies of said complaint, case, and exceptions and exhibit contained in the volume aforesaid now remaining on file in this office.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this eighth day of November, A. D. 1899.

[Seal State of New York Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

Supreme Court, Cattaraugus County.

JOHN T. BAXTER
against
BROOKLYN LIFE INSURANCE COMPANY.

The plaintiff herein, by Cary & Rumsey, his attorneys, for a complaint and cause of action against the defendant

alleges upon information and belief that at all the times herein mentioned the defendant was and still is an insurance corporation, organized and constituted and doing business under and by virtue of the laws of the State of New York, and engaged in the insurance of the lives of persons.

That on or about the 24th day of May, 1884, the said defendant, for value received, made an agreement in writing with and issued its written policy to and on the life of Joel J. Matteson, whereby and in and by the terms of which the defendant, in consideration of the payments hereinafter named, agreed and undertook that within sixty days after the receipt by it of satisfactory proofs of the death of the said Joel J. Matteson it would pay to Maria Matteson, wife of the person hereby insured, for her sole use, the sum of three thousand dollars.

That it was agreed on the part of said Joel J. Matteson that in consideration of the issuance of said policy and the making of said agreement on the part of the defendant he would pay to it during his lifetime the sum of twenty dollars and ninety-seven cents each quarterly year, and that up to the time of the death of said Joel J. Matteson the said insured had made the payments upon said policy as agreed with said defendant.

Plaintiff further alleges upon information and belief that the said Joel J. Matteson died at the city of Bradford on the 7th day of September, 1884, and left him surviving his wife, Maria Matteson, for whose benefit said policy was issued and to whom the loss on the same was made payable.

Plaintiff further alleges upon information and belief that after the death of said Joel J. Matteson and on or about the 10th day of March, 1885, the said Maria Matteson caused to be delivered to the defendant proofs of the death of said Joel J. Matteson; that said proofs were delivered to one Jenkins, who was at said time in the employ of said defendant and who was duly authorized by it to receive the

same; that the proofs of death so delivered to and furnished the defendant were satisfactory proofs of the death of said Joel J. Matteson and were made in accordance with the directions of said defendant.

Plaintiff further alleges upon information and belief that on or about the 10th day of March, 1885, proofs of the death of the said Joel J. Matteson were delivered to the defendant.

Plaintiff further alleges upon information and belief that more than sixty days had elapsed from the time of the delivery of the proofs of loss as aforesaid up to the time of the commencement of this action, and that the said sum of three thousand dollars came due and payable before the commencement of this action and remains wholly unpaid.

The plaintiff further alleges that before the commencement of this action and prior to the issuance and service of the summons herein the said Maria Matteson, by an instrument in writing, duly sold, assigned, and transferred to this plaintiff the said sum of three thousand dollars and interest, due and owing to her by the defendant, and the claim and demand against the defendant for the same, and the right to sue for and collect the same from the defendant, and that the plaintiff is now the owner and holder of said demand and claim.

Wherefore the plaintiff demands judgment against the defendant for the sum of three thousand dollars, with interest thereon from the 10th day of May, 1885, besides the costs of this action.

CARY & RUMSEY,
Plaintiff's Attorneys, Olean, N. Y.

STATE OF NEW YORK, } ss:
Cattaraugus County, }

John T. Baxter, being duly sworn, deposes and says he is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to

the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN T. BAXTER.

Sworn to before me this 29th day of September, 1885.

E. F. KRUSE,
Notary Public.

Supreme Court, Cattaraugus County.

JOHN T. BAXTER
ag'st
THE BROOKLYN LIFE INSURANCE COMPANY.

Case and Exceptions.

This action was commenced on the 8th day of September, 1885, by the service of a summons.

The complaint was served on the 4th day of October and the answer on the 5th day of November, 1885. Copies of the summons, complaint, and answer are contained in the judgment-roll.

The issues joined in this action came on to be tried before the Honorable Albert Haight, one of the justices of this court, at a circuit court held in and for the county of Cattaraugus, on the 12th day of September, 1886.

A jury was called and sworn, and the plaintiff, by his counsel, opened the case.

The plaintiff, to maintain the issue on his part, offered in evidence a policy of insurance, dated the 24th day of May, 1884, issued by the defendant on the life of Joel J. Matteson, payable to Maria Matteson, and the same was received in evidence. A copy of said policy is hereto annexed and marked Exhibit "A."

The plaintiff then called as a witness MARIA MATTESON, who, being duly sworn, testified as follows:

I reside in McKean county, Pennsylvania. Joel J. Matteson was my husband. He lived at Dayton, in Cattaraugus county, 1884. There was a time in 1884 when he went to Pennsylvania. I really do not remember what time it was. He went there before I was acquainted with him. I was married to him ten years ago, the twenty-seventh of May. In 1884 he lived in Emporium, McKean county. He died on the 6th day of September, 1884, at the town of Bradford. He was complaining all through the month of August. He went down to the mill and hurt himself. From the middle of August up to the time of his death he was confined to his bed, and during such time he was unable to transact any business; did no business during that time. He was buried in Smithport. I was present at the time of his death and burial. He lived about ten miles from the city of Bradford, but in the township of Bradford, in Pennsylvania.

Counsel shows paper to witness.

Question. Is that your signature?
Answer. Yes, sir.

Counsel for the plaintiff offered in evidence the paper referred to, the same being an assignment and transfer by the witness to the plaintiff of the cause of action mentioned in the complaint; which assignment bore date prior to the commencement of this action, and the same was received in evidence.

The counsel for the plaintiff here rested.

The counsel of the defendant then moved for a nonsuit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium stipulated to be paid by the terms of the policy on the 24th day of August prior to the death of the insured.

The motion was denied; to which decision the counsel of the defendant then and there duly excepted.

It was stipulated in open court by both parties to the action that there is due on the policy $3,177.09, for which sum the plaintiff is entitled to a verdict if a recovery can be had in his favor.

The court then directed the jury to find a verdict in favor of the plaintiff for the sum of three thousand one hundred and seventy-seven dollars and nine cents.

To which direction the defendant's counsel then and there duly excepted.

The jury, as directed, found a verdict in favor of the plaintiff for $3,177.09.

The court then ordered that the exceptions so taken be heard in the first instance at the general term, and that judgment be suspended in the meantime; that the defendant have sixty days to prepare and serve case, and that if made and served that the stay continue until the hearing and decision of the motion at general term.

All the evidence and proceedings had upon the trial are above stated.

WILLIAM H. FORD,
Defendant's Attorney,
No. 51 Liberty Street, New York.

EXHIBIT A.

The Brooklyn Life Insurance Company of New York.

(Vignette.)

Amount, $3,000.	Quar. prem., $20.97.
No. 21839.	Age, 35 years.

By this policy of assurance, in consideration of the application for this policy, and of each of the statements and agreements made therein, and under the conditions and

limitations hereinafter specified, promise to pay to Maria Matteson, wife of the person hereby insured, for her sole use, if living, and if not living, to the children of said person, or their guardian for their use, or if there be no such children surviving, then to the executors, administrators or assigns of the person hereby insured, the sum of three thousand dollars, at the office of said company, in the city of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of this policy of Joel J. Matteson of Bradford, in the county of McKean, State of Pennsylvania.

Subject to the following conditions and limitations:

1st. The quarter-annual premium of twenty dollars and ninety-seven cents shall be paid in advance on the delivery of this policy and thereafter on the twenty-fourth day of August, November, February and May, in every year, during the continuance of this contract.

2nd. If any statement in the application be untrue, or if the insured shall engage in any unlawful occupation, or (unless by written permission of the company) in any occupation forbidden on the back of this policy, or if he shall be convicted of felony, or in case he shall die in consequence of violating law, or by his own act, whether sane or insane, or from the effects of the intemperate use of stimulants or narcotics, this company shall not be liable for more than the next reserve for this policy at the time of death, computed according to the American experience table of mortality, with four and one-half per cent. compound interest.

3rd. This policy shall be void if any premium or part of a premium be not paid when due; but if such forfeiture shall occur after three full years' premiums have been paid, the company will issue a paid-up whole life policy, in accordance with the provisions of chap. 347, of the Laws of 1879, of the State of New York, provided this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above.

4th. The provisions and requirements printed by the company upon the back of this policy, are hereby referred to and accepted as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

But it is specially agreed that if the death of the insured shall take place after three years while this policy is in force, and not in consequence of any unlawful act or forbidden occupation then in no such case shall the full liability of the company under this policy be disputed.

In witness whereof, the Brooklyn Life Insurance Company have by their president and secretary signed and delivered this contract at the city of New York, in the State of New York, this twenty-fourth day of May, one thousand eight hundred and eighty-four (1884).

W. M. COLE, *President.*

WM. DUTCHER, *Secretary.*

Printed on the back of said policy and referred to therein is the following provision:

6th. This policy is a contract made and to be executed in the State of New York, and shall be construed only according to the laws of that State, and no suit shall be brought against the company upon this policy, except in the courts of that State, or in the circuit or district courts of the United States, nor shall any such suit be brought after the lapse of one year from the time when the cause of action accrues.

STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of answer made from a printed

copy thereof submitted and filed on the argument of the case of John T. Baxter ag'st The Brooklyn Life Insurance Company, in the court of appeals, on the 29th day of January, 1890, now bound up and contained in volume No. 8 of cases and points for the year 1890, and on file in this office, and that the same is a correct transcript therefrom.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this tenth day of November, A. D. 1899.

[Seal State of New York Court of Appeals.]

W. H. Shankland, *Clerk.*

Supreme Court, Cattaraugus County.

John T. Baxter
ag'st
The Brooklyn Life Insurance Company.

The defendant answers the complaint of the plaintiff:

I. The defendant denies the following allegations of the complaint: That it was agreed on the part of the said Joel J. Matteson that in consideration of the issuance of said policy and the making of said agreement on the part of the defendant he would pay to it during his lifetime the sum of twenty dollars and ninety-seven cents each quarterly year, and that up to the time of the death of said Joel J. Matteson the said insured had made the payments upon said policy as agreed with the defendant, and that the sum of three thousand dollars came due and payable before the commencement of this action. The defendant has no knowledge or information sufficient to form a belief whether the said Maria Matteson made the assignment to the plaintiff alleged in the complaint.

II. The defendant, for a separate defense to this action, alleges that on the 24th day of May, 1884, the defendant, on

the application of said Joel J. Matteson and Maria Matteson, by its certain policy of insurance, in consideration of the application for said policy and of each of the statements and agreements therein contained and under the conditions and stipulations thereinafter in said policy specified, did promise to pay to Maria Matteson for her sole use, if living, the sum of three thousand dollars, at the office of the company in the city of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of said policy of said Joel J. Matteson, subject, however, to the following conditions and limitations, among others, to wit, that the quarter-annual premium of twenty dollars and ninety-seven cents should be paid in advance on the delivery of said policy, and thereafter on the twenty-fourth day of August, November, February, and May in every year during the continuance of said contract of insurance, and that said policy should be void if any premium or part of a premium should not be paid when due.

That the aforesaid policy and contract insuring the life of Joel J. Matteson are the same policy and contract of insurance alleged in the plaintiff's complaint in this action.

The defendant alleges that on the twenty-fourth day of August, 1884, a premium of twenty-four dollars and ninety-seven cents became due on said policy, and that the sum so due and no part thereof has been paid.

Wherefore the defendant demands judgment that the complaint in this action be dismissed with costs.

WILLIAM H. FORD,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss.:*

William Dutcher, being duly sworn, says he is the secretary of The Brooklyn Life Insurance Company, the defendant in this action, and that the foregoing answer is true to

the knowledge of this deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WM. DUTCHER.

Subscribed and sworn before me this 5th day of November, 1885.

JOHN W. JENKINS,
Notary Public, N. Y. County.

No. 12.

Addition to Record.

IN THE

Supreme Court of the United States.

No. 12.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR AND PETITIONER,

vs.

NELLIE PHINNEY, AS EXECUTRIX, &c.

Opinion of United States Circuit Court for the District of Washington.

DELIVERED MARCH 26, 1895.

HANFORD, *District Judge:*

This case was argued upon demurrer to the affirmative defenses in the answer.

The second affirmative defense pleads no facts. A mere naked conclusion that the contract of insurance was waived, abandoned, and rescinded is alleged. That is not a good pleading, and for that reason the demurrer to that defense is sustained.

The third affirmative defense pleads a breach of warranty as a defense, and, in accordance with the opinion which I have filed in the case of Christine Selby against this same

defendant (67 Fed., 490), that defense is insufficient. The case is exactly like the Selby case, and comes within the rule that I have given in the opinion in that case. On that ground the demurrer to the third affirmative defense is sustained.

The fourth affirmative defense is entirely made up of conclusions of law. This defense anticipates the claim and contention of the plaintiff (which is not set out in any other part of the pleadings) in regard to the effect of the New York statute upon life insurance policies issued by companies doing business in that State, and attacks the statute for being repugnant to the Constitution of the United States, and void. This is entirely a matter of law, and contains no facts constituting a defense. The demurrer to that defense is sustained on that ground.

Now I go back to the first affirmative defense. This sets forth the place and the manner of the making of the contract, and the terms of the contract. It shows that the application for insurance was written and signed by Mr. Phinney in the State of Washington, and transmitted through a local agency of the insurance company in this State to the general Pacific Coast agency in San Francisco, and thence to the home office in New York. The policy was written in New York, and transmitted through the general Pacific Coast agency in San Francisco to the local agency in this State, and delivered to Mr. Phinney, and the first premium upon the policy was collected in this State. By the terms of the policy the premiums are payable annually, on a specified day, and the policy is to be void if the premiums are not paid. It shows that two annual premiums, after the first one, accrued before Mr. Phinney's death, and were not paid. It shows also that the policy c[illegible]ains a provision that notice that the premiums are due [illegible] payable on the dates mentioned in the policy is give[illegible] and accepted by delivery of the policy, and any other notice or obligation to give notice is waived. Now, that is a complete defense under the general

law governing the making of contracts. An agreement to insure, upon condition that the insured shall make periodic payments of premiums, binds the insurer only if the premiums are paid, and failure to pay the premiums avoids all liability, and relieves the insurer of all liability to pay. But the State of New York has made a statute of a radical nature, intended to check somewhat the large accumulation of money in the hands of life insurance companies through forfeitures of premiums, by giving the people dealing with these companies some percentage of advantage, making it a condition of the right of an insurance company to avoid the policy and forfeit the premiums that have been paid that the company shall issue a certain prescribed kind of notice; and the decisions of all the courts of this country, in New York and other States and the Federal courts, tend to sustain this law, and to hold the insurance companies to a strict compliance with the statute, as a prerequisite condition to the avoidance of a policy for non-payment of premiums. In numerous cases it has been adjudged that the insurance company is liable notwithstanding the failure to pay premiums when due, by reason of their failure to prove that the notice was sent as required by the statute. So that, under the law of New York, this defense is insufficient, because it does not allege that the insurance company sent the notices prescribed by the statute of New York. There being this difference between the general law of contracts and the law of New York, the question is squarely raised whether this contract and the rights of the parties are to be in accordance with the statute of New York or with the general law of contracts, which is the law of the State of Washington. The defendant contends that this is a Washington contract, because the contract was made here. It was made here because the last act necessary to complete the making of the contract was in this State, and according to all the rules and authorities it is the law of the place of the contract, in the sense that this is

the place where the contract was made; and it is a general rule of law that contracts are subject to the laws of the place where made, as regards the formalities necessary, in entering into a contract, to bind the parties, and as to the validity of the contract itself. The law of the place where the contract is made is also the law by which the contract must be construed, and by which the obligations of the parties are to be determined, unless it appears that they have contemplated, at the time of making the contract, a different law; and usually it is understood that they do contemplate a different law to govern the liability of the parties where they expressly contract that the performance is to be at a place where there is a different law. I must decide this case according to what appears from the pleadings to have been the intent of the parties as to what law should govern its construction, and determine the obligation of the parties as to performance. In the first place, it is expressly provided that the premiums to be paid are payable at the home office of the company in New York; that the amount of money which the insurance company agreed to pay as insurance shall be payable at the company's office in New York, and proof of the death is to be made there; so that in all particulars this contract is to be performed in New York. New York, therefore, is the place of the contract in the sense that it is the place at which the parties agreed to perform their contract on both sides—pay the money for the premiums there, and pay the insurance, if any accrues, there. In addition to that, the application for the insurance, signed by Mr. Phinney, contains the declaration that the application is made to the Mutual Life Insurance Company of New York, subject to its charter and the laws of New York. This application, by its own terms, and by the express provisions of the policy issued upon it, is a part of the contract.

It is contended that the parties have not adopted the law of New York as to the policy, but only as to the applica-

tion. I can hardly understand why parties would intentionally complicate a contract by making the law of New York applicable to one part of it, and yet have it in other respects governed by the laws of the State of Washington. It is not made to appear to me in any way what particular law of New York they wanted to avoid by having the contract executed here, or what particular law of the State of Washington they wanted to avoid by having the application made subject to the laws of New York. If there was any such intention, it would look as if this provision made by the company in the printed blank which they used for making the application was an intentional trick to operate against the insured in any way in which the laws of New York would be prejudicial to him without binding the company to the strictness prescribed by the laws of New York, so far as they operate in favor of the insured. If I should give the contract such a construction, I do not think that it would be fair. There is, at least in the contract itself, evidence that the parties had in contemplation the law of New York as an element of the contract, and by having expressly provided that the contract is to be performed in New York they have made the laws of New York the law of the place of the contract, so far as it affects the obligation of the parties in respect to performance. The law of New York, by its terms, applies to all life insurance companies transacting business in that State. It is contended that this statute, if it is made to apply to contracts of life insurance entered into outside of the State, is unconstitutional, because it will not operate equally upon all life insurance companies doing business in New York; that the legislature has not the power to prescribe an obligation of this kind to affect a Connecticut life insurance company doing business in New York and also doing business in the State of Washington, as regards the contracts of the Connecticut company made in Washington, and that, therefore, a home

company would be placed at a disadvantage, as compared with a company of a diffrent State transacting business in New York. I think that argument is based upon false premises. I think that the binding force of the statute applies to all companies equally. It applies to all New York companies as to all business which they do in that State, and it applies to Connecticut companies as to all business that they do in New York. I think that if a Connecticut company, having an office in New York, writing and issuing policies there, collecting premiums there, and doing all the business of life insurance companies in the State of New York, should receive an application at its office in New York, from Washington, act upon it there, issue a policy there, which by its terms would be performed in the State of New York, the contract would be governed by the law of New York, just the same as though its incorporation was under the law of New York instead of being under the law of Connecticut. This statute has been upheld by so many decisions that it is beyond question a valid statute with respect to all business transacted within New York. Now, this transaction, although the contract was made in the State of Washington, is business done in New York. The policy was written there; the default of the insured, and right of forfeiture, could only occur in New York, because there could be no default in payment until, on the date when the premiums were due, the insured failed to pay the premium in New York. There is where the default occurred upon which alone this company can claim to be released from its liability under the policy. This subject of the law of the place of contracts has received attention from the Supreme Court of the United States in a number of cases, and the difference between cases where the law of the contract is the law of the place where the contract is entered into and those in which the contract is governed by the law of the place of performance

is illustrated in a number of decisions,—in some of the older decisions as well as the late ones. One of the clearest expositions of the law is to be found in the opinion of Mr. Justice Hunt in the case of Scudder *vs.* Bank, 91 U. S., 406. In the course of the opinion, Justice Hunt makes this statement:

"The rule is often laid down that the law of the place of performance governs the contract. Mr. Parsons, in his treatise on Notes & Bills, uses this language: 'If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated' (page 324). For the purpose of payment and the incidents of payment, this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance. The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill, are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule that the place of performance governs the bill. The same author, however, lays down the rule that the place of making the contract governs as to the formalities necessary to the validity of the contract. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing (Dacosta *vs.* Davis, 24 N. J. Law, 319). So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment (Aymar *vs.* Sheldon, 12 Wend., 439). So if a note, payable in New York, be given in the State of Illinois, for money there lent, reserving ten

per cent. interest, which is legal in that State, the note is valid, although but seven per cent. interest is allowed by the law of the former State (Miller *vs.* Tiffany, 1 Wall., 310; Depau *vs.* Humphreys, 8 Mart. (N. S.), 1; Chapman *vs.* Robertson, 6 Paige, 634; Andrews *vs.* Pond, 13 Pet., 65). Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. A careful examination of the well-considered decisions of this country and of England will sustain these positions."

That case has been referred to, and the distinction is further brought out in a later decision of the Supreme Court in Pritchard *vs.* Norton, 106 U. S., 124, 1 Sup. Ct., 102. It is also referred to, and its doctrine is recognized as sound, in the case of Liverpool & G. W. Steam Co. *vs.* Phenix Ins. Co., 129 U. S., 397, 9 Sup. Ct, 469, where Mr. Justice Gray reviews the American and English decisions. His application of the rule may seem to be inconsistent with my conclusion in this case. The Supreme Court certainly held in that case that the law of the place of making the contract governed as to the validity of a stipulation by which one party agreed in advance to waive all claim for damages by reason of a breach of the contract by the other party. The principle of that case would be applicable to the case we have in hand if the conditions were exactly the same; but they are not. That was a contract of a carrier for transportation of merchandise from New York to England. The performance began in New York, and was to have been finally completed in England. There is a difference between the law of this country and the law of England as to the right of a carrier to exempt itself entirely from liability for damage caused by neg-

ligence of its servants. The Supreme Court applied the laws of this country, and nullified a provision in the bills of lading by which the carrier sought to be thus exempted. I do not think, under the principles recognized by the Supreme Court, the case would have been so decided if it had been a contract which was to have been entirely performed in England. The opinion makes it very plain that the court intended to rest its decision upon the facts that the contract was made in New York, the ship-owner having a place of business there, and the shipper being an American. The contract was single; its principal object, the transportation of goods, being one continuous act, to begin in New York, to be chiefly performed on the high seas, and to end at Liverpool; and there was nothing in the contract or surrounding circumstances tending to show that the parties looked to the law of England, or to any other law than that of the place where the contract was made.

The case of Scudder *vs.* Bank is cited with approval by the Supreme Court in the opinion of the Supreme Court in Coghlan *vs.* Railroad Co., 142 U. S., 101, 12 Sup. Ct., 150. The syllabus reads:

"When a contract for the payment of money at a future day, with interest meanwhile payable semi-annually, is made in one place, and is to be performed in another, both as to interest and principal, and the interest before maturity is payable according to the legal rate in the place of performance, the presumption is, in the absence of attendant circumstances to show to the contrary, that the principal bears interest after maturity at the same rate."

And that is shown to be so, because the law of the place of performance governs the contract as to the manner of performance. The opinion is by Mr. Justice Harlan, and he reviews a great many decisions, and squarely recognizes the doctrine laid down by Judge Hunt and by Judge Matthews in the cases above referred to, and shows that it is in harmony with the decision of the Supreme Court by

Judge Gray in the case of Liverpool & G. W. Steam Co. *vs.* Phenix Ins. Co.

The waiver of notice is in the policy itself, and the provisions of the statute must prevail, notwithstanding a waiver of notice in the contract; and that is upon a principle, recognized in a number of decisions of the Supreme Court of the United States, that parties cannot make a contract whereby the requirements of a statute which is made in pursuance of a general policy can be evaded. This waiver of notice is contrary to the policy of the law of New York, and, although it is a provision made for the benefit of individuals, the individuals cannot, by their contracts, abrogate the positive provisions of a statute. The reasons for this rule are well stated by Mr. Justice Gray in the opinion of the Supreme Court in the case of Liverpool & G. W. Steam Co. *vs.* Phenix Ins. Co., *supra*, in which it was held that the policy of the laws of this country is against carriers making contracts in advance, securing exemption from liability for their own negligence. That was a case where the shipper expressly contracted to relieve the carrier from all risk and all liability resulting from the negligence of officers or crew of the ship or agents of the company handling the merchandise. Notwithstanding that contract, the Supreme Court held that the laws of the country in which the contract was made forbid such contracts. It is certainly the policy of the New York law to prohibit insurance companies from avoiding their policies for non-payment of premiums where they fail to give the notice prescribed. I hold that the law of New York is applicable to this contract, and the defense is not sufficient, because it would not be a good defense in New York. The demurrer is sustained.

Mr. STRUDWICK: I call your honor's attention also to the fact that the demurrer to the second, third, and fourth affirmative defenses was rested in part upon the ground that by the provision of this policy the policy was incontestable

after a certain length of time, and I submitted at the time the reasons why I did not think that clause would prohibit the setting up of these defenses if they were otherwise valid, and I would like to know what conclusion your honor reached upon that proposition.

The COURT: I think the incontestable clause in the contract was intended to shut off such a defense as you have set forth in the second affirmative defense after two annual premiums have been paid. I do not think the company would be bound by the clause, or precluded from contesting the liability within any length of time, unless the policy had been lived up to on both sides for two years. The second premium would have to be paid in order to give the insured the right to shut off a defense by virtue of that clause.

No. 452.

Sh. & Short, Davies, [illegible]

452 Shattuck [illegible]

NOV 30 1899

Filed Nov. 20, 1899.

Supreme Court of the United States,

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Plaintiff in Error, vs. BESSIE F. SEARS, as Executrix of the Last Will and Testament of Stephen P. Sears, Deceased, Defendant in Error.

BRIEF OF PETITIONER

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IN THE

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BRIEF OF PETITIONER.

STATEMENT.

In this case the policy was for $10,000. Two premiums of $491 each were paid. Sears lived five years more and never paid another premium, dying March 30, 1898.

The Mutual Life Insurance Company of New York, a cor-

poration, chartered as such by special act of the Legislature of the State of New York, in May, 1891, insured the life of Stephen P. Sears by a policy in the sum of ten thousand dollars, for the term of ten years. At the time of taking the insurance, Sears was a resident and citizen of the city of Tacoma, Washington. The insurance company had complied with the laws of the State of Washington requiring any foreign corporation transacting business therein to file with the Secretary of State a copy of its articles and to appoint an agent at its principal place of business in the State. The statutory agent was also the general agent of the insurance company in the State, representing it in the conduct of its business therein. It also had soliciting agents and medical examiners residing in the state. (Record, p. 16.) The insurance company had a general office at San Francisco for the conduct and management of its affairs on the Pacific Slope. The application for insurance and the physical examination of the applicant were made at Tacoma, where the company had an agent. The application was delivered to the agent of the company at Tacoma, and by him transmitted to the general office in New York, and in due course the policy of insurance was issued and transmitted by mail to the agent at Tacoma, who thereupon receiving from said Sears the first annual premium of $491 delivered the policy to Sears.

The laws of the state of Washington confer upon foreign corporations authority "to do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state." (See Petition, p. 4.)

The application for insurance and the endorsements upon the policy were made a part of the contract. In the application it was provided that the policy "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health;" and also that "this application is made to The Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York." Among the endorsements on each policy is the following: "Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. * * * If this policy shall become void by the non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided." (See Petition, pp. 6 and 7.)

Stephen P. Sears continued to reside in Tacoma until his death on March 30th, 1898. The annual premium falling due May 18th, 1892, was paid, *but no payment was made of any premium falling due subsequent to that time*, and the last premium before death would have been due May 18, 1897. The policy was entered upon the books of the company as lapsed and forfeited for non-payment. The insured was aware of these facts and was all the while aware of the amounts of the premiums and when they were due, and not only neglected but refused to make payment. (Record, p. 18.)

Subsequent to the noting and entry of the policy as

forfeited, the insurance company applied to Stephen P. Sears to make restoration of his policy by making payment of the defaulted premium, but Sears refused to make such payment and refused longer to continue the policy, and the insurance company, relying upon such determination and election of Sears, ever after treated the policy as forfeited and terminated and abstained from mailing or sending any notice. (Record, p. 18.) After the death of said Stephen P. Sears, Bessie F. Sears, his widow, was appointed executrix of his last will, and began suit upon the policy *September 28th, 1898*, more than *six* years after the first default and *sixteen months* after the final default in May, 1897.

The complaint set up the policy of insurance, including the application and endorsements upon it, which were made a part of the policy. Performance by the insured of all the conditions of the contract was averred, but controverted by the defendant company, as was also the allegation that the contract was made in the state of New York.

The Mutual Life Insurance Company as a first defense to the policy, set up that it was a contract entered into in the state of Washington; that the insured had neglected and refused to pay the third annual premium falling due upon the policy, and in consequence it had lapsed and become forfeited according to its terms.

And as a second affirmative defense the insurance company set up that said Stephen P. Sears was, prior to the issuance of the policy, and until the date of his death, March 30th, 1898, a citizen and resident of Tacoma, Washington; that the company had complied with the laws of the state of Washington regarding foreign corporations transacting business therein and had appointed a statutory agent in compliance with the statute,

who was likewise its business agent in the state, and had as well its medical examiner and soliciting agents in the state; (Record, p. 16); that the application for the insurance was made at Tacoma, where the medical examination was had, and was there delivered to the agent of the company, who mailed it to the home office in New York, and the policy was issued and transmitted to the agent of the insurance company at Tacoma, and there the first annual premium was paid and the policy delivered; that by the terms of the application which was a part of the policy, it was stipulated that the policy "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health;" and that the policy contained the following provision: "Notice that each and every such payment is due at the date given in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived." It was also alleged that neither Stephen P. Sears nor any one on his behalf, ever paid or offered to pay any premium becoming due subsequent to that paid on the 18th day of May, 1892; that Sears was at all times informed that default had been made by him in the payment of every such premium subsequent to that last named; that the insurance company had noted and entered the policy of insurance upon its books as lapsed and forfeited for failure to pay the annual premium falling due May 18th, 1893; that Sears was fully informed of the action taken by the insurance company in entering the policy as lapsed and terminated for non-payment of premium; that afterwards The Mutual Life Insurance Company, through its agents, applied to said Stephen P. Sears at Tacoma to make restoration of the policy by making payment of the defaulted premium, but that Sears refused to make such payment and refused longer to continue the policy, or to make

any further payments upon it, and then elected to terminate the policy so far as he was concerned, and that relying upon such determination and conduct of Sears, The Mutual Life Insurance Company had thereafter treated the policy as lapsed, abandoned and terminated, and relying upon the statements and conduct of Sears abstained from taking any further action or giving any notice to effect the termination and forfeiture of the policy.

(Record, pp. 17-18.)

A demurrer to the entire answer and to the separate defenses was sustained by the Circuit Court, and judgment rendered against the insurance company for the amount of the policies less the unpaid premiums. (Record, p. 22; Petition, p. 9.)

Upon writ of error the Circuit Court of Appeals affirmed the judgment of the Circuit Court.

Upon the foregoing abbreviated statement of facts, which are more fully set forth in the petition for certiorari, the petitioner asks this Court to grant a writ of certiorari.

ARGUMENT.

We present the following reasons why a writ of certiorari should be granted by this Court under Section 6 of the Act of March 3rd, 1891, (*26 Stats. at Large, 826*) requiring the record and cause to be sent up to this Court for its consideration:

THE STATUTE OF NEW YORK RELATING TO FOREIGN CORPORATIONS TRANSACTING BUSINESS IN THAT STATE IS NOT OPERATIVE BEYOND THE STATE OF NEW YORK.

By the terms of the statute it applies alike to foreign and domestic corporations. Its language is: "No life insurance

corporation doing business in this state shall declare forfeited or lapsed any policy." The language employed respecting the foreign corporation measures the authority assumed as to the domestic corporation. It is a regulating statute as to business done in the state of New York and not beyond its boundaries. It is a statute outside of the contract of insurance, recognizing the contract as being complete in itself, independently of the statute. The further provision that proof of the sending or mailing of the notice may be established by the affidavit of an officer of the corporation, which shall be presumptive evidence that such notice was given, demonstrates that the statute was one designed to operate upon persons within the state of New York.

"The affidavit of any officer, clerk or agent of the corporation or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

(Petition, p. 3.)

It is not within the competency of the legislature of one state to enact rules of evidence for the use of another state or government.

Wharton, in his Conflict of Laws, says (Sec. 752, 2nd Ed.):

"There can be no question that the *lex fori* is also to determine the competency and weight of evidence adduced to prove a litigated case. * * * On the one side, every case must be governed by the law in which it has its seat. On the other side, the court, in which such case comes to be tried, must direct its own procedure."

In 2nd Parsons on Contracts, 7th Ed., p. 718, the rule is thus stated:

"But on the trial, and in respect to all questions as to the

forms, or methods, or conduct of process, or remedy, the law of the place of the forum is applied."

It is thus seen the statute is one of public policy for the state of its enactment, establishing rules of evidence to be applied so far as the law itself extends. The conceded object of this statute is to relieve the negligent and improvident policy holder from the consequences of his carelessness in failing to pay the premiums upon his policy as they fall due. Taking into consideration the date of the enactment of the statute, 1876, and the condition of the mail service throughout the United States at that time, the period of thirty days fixed as sufficient for advising the holder of a policy of the due date of his premium and affording him opportunity of making payment of the same at the home office in New York City, would render the statute effectual for the purpose for which it was designed, if limited to the state of New York, but totally ineffectual, for practical purposes, if extended to all other parts of the United States. It will not be presumed that the legislature recognizing the evil to be remedied, would stop short of an ample relief.

IN VIEW OF THE UNCERTAINTY OF THE DECISIONS AS TO THE LAW CONTROLLING THE PERFORMANCE OF CONTRACTS LIKE THE ONE IN CONTROVERSY, THE OPINION OF THIS COURT WILL BE OF PUBLIC IMPORTANCE AND TEND TO SECURE UNIFORMITY OF DECISION.

The court adopted the view that the policy was a New York contract and its provisions were dominated and controlled by the statutes of that state relating to insurance companies, and that compliance with such statutes was indispensable to a forfeiture of the policy for non-payment of the premiums.

(Record, pp. .)

It is true the application recites that it was made subject to the charter of the company and the laws of New York, and

that payments are to be made at the home office of the insurance company. But it stands admitted that the insurance company had complied with the laws of the state of Washington respecting foreign corporations transacting business in that state in pursuance of the laws; that it there had its agent and was there carrying on its business; that the insured was from the time of making his application to his death, a citizen and resident of Tacoma; that his written application for insurance was made and delivered to the company's agent at Tacoma and by him transmitted to the New York office; that the policy of insurance was transmitted to the agent at Tacoma, and upon payment there of the first annual premium was delivered to said Stephen P. Sears; that the contract expressly provided that it should not take effect until "the first premium shall have been paid and the policy shall have been delivered;" that the insured, throughout his life, admitted he had not paid any other than the first and second annual premiums; that he was aware the company had cancelled the policy for non-payment as by its terms provided; that he acquiesced in the mutual understanding that the policy was lapsed and forfeited, and consented that the company should so regard it and abstain from giving notice; that at Tacoma, subsequent to the entry of the lapsing and forfeiture of the policy of life insurance, The Mutual Life Insurance Company, through its agent, applied to said Stephen P. Sears to make restoration of the policy by paying the defaulted premium, but that said Sears refused to make such payment and refused longer to continue the policy or to make any future payment and consented that the company should regard the policy as terminated. (Record, p. 18.)

The case in each of the elements going to determine where the contract was executed and by what law it should be governed, is substantially like that of the *Equitable Life Assurance*

Society v. Clements, 140 U. S., 226, where Justice Gray summarized the case substantially as follows:

The assured was a resident of Missouri and the application was signed there; the policy was executed at the company's office in New York and provided that the contract was set forth in the application and policy taken together. The application declares the contract shall not take effect until the first premium has actually been paid during the life of the assured. The two premiums were paid in Missouri. The answer admits the payment of the premiums and the petition alleges the policy was delivered in Missouri to the assured. The opinion then proceeds:

"Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri." *(P. 232.)*

Unrestricted freedom of contract is conspicuously made manifest in this policy; whatever else may be doubtful, there is no uncertainty left in respect to the intention of the parties in this respect. They agree that the notice contained in the policy is given and accepted by the delivery and acceptance of the policy and expressly waive any other notice, and declare the contract shall become void by non-payment of premiums. This freedom of contract was guaranteed by the law of the state of Washington where the contract was made.

In the case of *Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S., 397,* the court lays down the following rule:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence,

of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country." *(P. 458.)*

The *Brantford City, 29 Fed., 373*, is forcibly in point. A contract was made at Boston with local agents of the British Steamship Company, by the terms of which libelants were to ship cattle on a British steamer from Boston, and deliver them at Deptford, England, for a freightage of eighty-five shillings sterling per head. The court says:

"2. The defendants contend, however, that, inasmuch as the cargo was taken on board of a British ship, and as the bill of lading was signed by a British master, for transportation to England, the stipulations of the bill of lading exempting the ship from liability for negligence and from loss by death, however occasioned, afford a complete defense; because such stipulations are valid by the laws of England.* * * The question presented is a very important one. All the steamship lines, whether domestic or foreign, that sail from this port, insert in their bills of lading substantially the same conditions. Considering the number and the magnitude of the shipments by these lines, and the very diverse views found in the text-books and decisions upon this branch of the conflict of laws, I have deferred a decision of the cause until able to give the questions involved something, at least, of the consideration their importance demands. The conclusion to which I have come is that our law must prevail, whether the question be viewed as a question of responsibility for a tort or for the construction and validity of the exceptions in the bill of lading, in a conflict of

laws; or as a question of evidence and procedure; or as a question of comity as related to our national policy."

Cox v. United States, 6 Pet., 83, 172, 203.
Scudder v. Union Nat'l Bank, 91 U. S., 406.
The Pennsylvania Co. v. Wm. Fairchild, 69 Ill., 260.
McDaniel v. The Chicago & N. W. Ry. Co., 24 Iowa, 412.

THE STATUTE OF NEW YORK DOES NOT ENTER INTO THE CONTRACT OF INSURANCE, NOR INTO THE CHARTER OF AN INSURANCE COMPANY CREATED UNDER THE LAWS OF THAT STATE.

It is manifest the contract of insurance is complete without reference to this statute. The statute left the parties free to make such contract as they saw fit. No limitation is placed upon their right of contract. It is not until a breach has occurred in the non-payment of premium that the statute becomes applicable. It is against the consequences of a breach of the contract that it purports to afford relief. The legislature is at liberty to repeal such statutes without disturbing vested rights. If enacted, they come by way of grace; if repealed, they leave the parties standing upon their contracts as they have seen fit to enter into them.

In *Rosenplanter v. Provident Savings Life Assur. Soc. of New York,* 91 Fed., 728, Hammond, J., speaking of this statute and others of the same nature, says:

"They are not statutes of contract, but remedial statutes; and as to these the rule is that they are not a part of the obligation of the contract. It is not because of the effect of either of these statutes that we have under consideration that the plaintiff or the beneficiary has not incurred a forfeiture strictly according to the terms of the contract, but only that the legislature of New York, having authority over contracts made within the state of New York, has relieved her against a forfeiture so far as the statutes apply, but no further. One who grants a bounty may withdraw it; and it is a mistake to suppose that the right to it

becomes perpetual because it has once been granted, where the nature of the gift is such that it must recur from time to time."

In affirming the case of *Rosenplanter v. The Provident Savings Life Assurance Society of New York* (96 Fed., —), the Circuit Court of Appeals meets the question as follows:

"But the very zealous and learned counsel for the beneficiary have very strongly urged that as this contract was made while the act of 1877 was in force, the provisions of that act became so incorporated into the contract as to become a part of the contract itself, and that the provisions of the act of 1877, prohibiting a forfeiture of the interest of the insured in the policy without a notice according to the terms and conditions of the statute, became as much a term and stipulation of the policy as if inserted therein by the parties themselves. Upon this assumption, they insist, that the act of 1877 could not be altered, or amended, or repealed, so as to subject the contract to forfeiture without the statutory notice, as such repeal or amendment would impair the obligation of the contract.

"To this we cannot agree. The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy without more ado. So with respect to the payment of the second half of the yearly premium; if not paid when due, the contract was thereby terminated. The act of 1877 interposed and for the benefit of the insured provided, that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. * * *

"Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as laws impairing the obligation of contracts or as an impairment of vested rights. *Conn. Life Ins. Co. v. Cushman,*

108 U. S., 51-65; *Ewell v. Daggs*, 108 U. S., 143; *Gross v. United States Mortgage Co.*, 108 U. S., 477; *Butler v. United States B. & L. Ass.*, 97 Tenn., 679; *Curtis v. Leavitt*, 15 N. Y., 15, 85; *Lewis v. McElrain*, 16 Ohio, 347; *Trustees v. McCaughy*, 2 Ohio St., 152; Cooley, Const. Lim., sides pages 293-378.

"Judge Hammond, who heard this case below, very admirably answered the argument that the act of 1877 so entered into the contract as to make its repeal an impairment of its obligations, by saying:

" 'If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and of course the law could not make another contract for them. Wherefore, it would be enforced by the courts as the agreement of the parties; but the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice as required by the act of the non-payment of premiums before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract which it was entirely competent for the legislature to withdraw, alter or amend, as to it might seem best.

" 'Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel. That is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but if the legislature has the power to import into an existing contract such a regulation for giving notice

without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary.'"

In the case of *Ewell v. Daggs*, 108 U. S., 143, it was held that the repeal of the statute of Texas which made contracts void for usury, acted retrospectively and took away the right of the defendant to make the defense of usury, but that such a repeal was not legislation impairing the obligation of contracts. Mr. Justice Matthews uses this pertinent language:

"The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. * * *

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract." (pp. 150-151.)

In *Gross v. U. S. Mortgage Co.*, 108 U. S., 477, construing a

statute which gave validity to a contract otherwise invalid, this Court, through Mr. Justice Harlan, says:

"When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt."

It is thus seen the statute of New York does not enter either into the contract of insurance or the charter of the insurance company. The statute being one of remedy and of public policy, cannot extend beyond the borders of the state of New York. If it enters into a contract made outside of New York or comes by way of remedy for its breach, it does so as a stipulation of the parties, and not by the authority of the legislature. By the terms of this policy it did not become a contract until it was delivered at Tacoma where the first annual premium was paid. This marks the radical difference between business done or a contract made by the insurance company in the state of New York and outside of that state. In the one case the policy of the law which is omnipotent, enters into the contract and controls the parties to it, while in the other, neither the statute nor its policy have a place, and therefore, as a statute and as a policy, it cannot enter into the contract or transaction.

THE PARTIES TO THE CONTRACT INTERPRETED IT AS A WASHINGTON CONTRACT.

Doubt as to the policy being a Washington contract should be solved by the interpretation of the parties themselves placed

upon it. In addition to the application being made, the premium paid and the policy delivered and the insured becoming a member of the association in the state of Washington, we have the admitted facts of the insurance company having a principal place of business in the state of the residence of the insured; that he was fully apprised of the time when the third premium became due and of its amount; that he was also apprised of the fact that the insurance company was treating the policy as a Washington contract and relying upon the express stipulation that no other notice was contemplated than that specified in the policy of the due date of premiums; it had noted and entered the policy upon its books as lapsed and forfeited for non-payment of the third annual premium; that he acquiesced in and consented to this as a proper interpretation of the contract, and that throughout the remaining years of his life he agreed to the termination of the policy and so consented and acquiesced in this interpretation and refused the offer of the insurance company to renew and restore the policy upon the payment of the defaulted premium, but elected to treat the contract as terminated, and that, acting upon this agreement, he had knowingly permitted all subsequent premiums to the date of his death, March 30th, 1898, to remain unpaid; that he knowingly induced the company to forbear from taking any other step to effect a termination of the contract, and that acting upon this agreement he had knowingly allowed five successive annual premiums to remain unpaid.

In *Railroad Co. v. Trimble, 10 Wallace, 367*, the court says:

"It was referred to in the argument as showing the construction put by the parties upon the deed of Howe to Trimble of the 9th of July, 1844. Where there is doubt as to the proper construction of an instrument this feature of the case is entitled to great consideration." *(P. 377.)*

Nickerson v. A. T. & S. F. R. R. Co., 17 Fed., 409.

The state of New York has a declared statutory policy respecting insurance companies transacting business within her boundaries. In some particulars it is restrictive and severely penal. The state of Washington, doubtless owing to her remote and somewhat isolated situation, as an inducement to population, capital and business enterprises, adopted the same policy of freedom of contract with domestic and foreign corporations as accorded to natural persons. The policy of New York cannot displace that of Washington within the latter state. If the place of the law governing the performance of a contract is uncertain and suit is brought upon it in the state where it was made, and by the policy of the laws of that state the express stipulations of the contract are valid, that fact should cause a court to decide the contract to be performed under the laws of that state rather than under the laws of another government where such stipulations must be regarded as illegal or the public policy of the government defeated.

In *Mutual Ben. Life Insurance Co. v. Robison, 54 Fed. Rep., 580*, a New Jersey insurance company insured a citizen of the state of Iowa. The insurance was solicited in Iowa, where the application and examination were made. The application was forwarded by the company's agent to Newark, New Jersey, where the policy was issued. The application for the policy stated: "That such contract shall at all times and places be held and construed to have been made in the city of Newark, New Jersey, and this policy does not take effect until the first premium shall have been actually paid." The premium was paid and the policy delivered in Iowa. If a New Jersey contract, the company was not liable. If an Iowa contract, it was liable, because the Iowa statute made the solicitor and medical examiner agents of the insurance company, while the New Jersey statute did not. The court, at pages 584, 588, says:

"We are, therefore, justified in holding that unless the clause in the application (with reference to construing the contract as made in New Jersey) shall take the case out of the rule as clearly established with reference to the point under consideration, the contract set out in the petition herein, must be construed by the laws of the state of Iowa. * * * We are, then, justified in holding that so far as the Iowa statute above quoted may apply to the contracts of insurance at bar, the Iowa law is the law which is to govern and furnish the rule of construction, 'anything in the application or policy to the contrary notwithstanding,' and a waiver thereof, as claimed by plaintiff, is ineffectual."

Wall v. Equitable Life Assur. Soc., 32 Fed., 273.
Berry v. Indemnity Co., 46 Fed., 439.
Equitable Life Assur. Soc. v. Winning, 58 Fed., 541.

THE INSURED DID NOT KEEP THE POLICY ALIVE BY THE PAYMENT OF THE ANNUAL PREMIUMS, AND THE CASE WAS SHIFTED FROM ALLEGED COMPLIANCE WITH THE TERMS OF THE POLICY ON THE PART OF THE INSURED TO LACK OF STATUTORY NOTICE BY THE INSURANCE COMPANY.

The defendant in error set up the contract of insurance and compliance with all its terms upon the part of the insured. The express provision of the contract thus pleaded was that the insured agreed to pay the annual premium of $491 on the delivery of the policy and an annual premium in that amount on the 18th day of May in each succeeding year thereafter during the continuance of the contract. It was further alleged that Sears died March 30th, 1898; that he performed all the terms and conditions of the contract on his part to be kept and performed, to the date of his death. No allusion was made in the complaint to the statute of New York; no allegation of offer or tender of the admittedly defaulted premiums was made.

Mr. Pomeroy in his work on Remedies and Remedial Rights, Section 556, says:

"The plaintiff is no longer permitted to aver the performance of the required act, and on the trial prove the circumstances which excuse such performance, or prove any other alternative than the one specifically alleged."

The case was shifted from alleged compliance with the contract of insurance to an unpleaded failure on the part of the insurance company to give certain notice required by the statute of New York. To have maintained a right of recovery under this statute it should have been pleaded.

Austin v. Goodrich, 49 N. Y., 266.
Churchill v. Onderdonk, 59 N. Y., 134.
Railroad Co. v. Sturgis, 44 Mich., 538; 7 N. W., 213.

THE ADMITTED FACTS SHOULD ESTOP THE EXECUTRIX OF THE WILL OF STEPHEN P. SEARS FROM RECOVERING ON THE POLICY.

Unless the statute of New York entered into the charter of The Mutual Life Insurance Company (and we have endeavored to demonstrate it does not), then a policy holder who, through a number of years has pursued the course admitted in this case, who has, knowing of the amount and the due date of each of the premiums on his policy, refused to pay them; who has knowingly consented to the noting and entry of the forfeiture of the policy by the insurance company after default in the payment of the premium falling due May 18th, 1893, of which he was advised, and who afterwards agreed and consented with the insurance company to the termination of the contract, and who, with that understanding has knowingly declined payment of all future premiums, and further refused to make restoration of his policy upon the payment of premiums when such opportunity was presented to him, and in-

duced the company to refrain from mailing notice, should be estopped from afterwards claiming the benefits of the contract. And if he, living, would be so estopped, the representative of his estate must be also. It cannot be argued that the state of Washington has no public policy against fraud and misrepresentation and against rewarding parties for their own demerits and delinquencies. It has such a policy. It is the policy of the common law, operative wherever rules of conscience are enforced and wherever courts of justice close their doors against parties who seek to take advantage of their own wrong. The policy of the state of New York cannot be transported to Washington in order to override a policy so universal and controlling.

In *Jones v. Alliance Mut. Fire Ins. Co., 34 Atlantic (Pa.), 198*, an insurance policy provided that on non-payment of assessments after thirty days' notice, the insurer might collect the same with twenty-five per cent. additional for cost of collection, but made no provisions for a forfeiture for non-payment. Not having paid the premiums, the insured, after the destruction of the property, brought an action to recover the amount of the policy. The court says:

"The question, then, comes down to this: Was there, or was there not, an extinguishment of exceptant's policy in defendant company by mutual consent of both parties? If it is a fact that, when the exceptant neglected to pay his assessment, his intention was and thereafter continued to be to abandon the policy; that the company acquiesced in that intention; and that, for any period of time thereafter, both understood that their relations were at an end, that the policy was dead,—such must be the legal effect given to their acts, and whether that effect be styled a rescission or a surrender or a cancellation or a forfeiture or an abrogation or anything else is quite immaterial. It certainly cannot be equitable for one of the parties to such an understanding, upon the subsequent occurrence of that which makes it desirable to him to hold the other to the original con-

tract, suddenly to change his mind, and because of the omission to give that formal notice which either might have given, which would have put their mutual understanding beyond doubt or question; but the absence of which has not prejudiced or misled either in the least degree, to assert that the policy was still in force, and come down upon the other for performance of his part of the bargain when his own has remained deliberately unperformed." *(P. 199.)*

Johnson v. Oppenheim, 55 N. Y., 280 (291).
Bryant v. Goodnow, 5 Pickering (Mass.), 228.
Farlow v. Ellis, 15 Gray (Mass.), 231.
Weymouth v. Gorham, 22 Maine, 385.
York v. Penobscot, 2 Greenleaf (Me.), 1.

In *Johnson v. Oppenheim,* this principle is thus stated:

"When some formal act or acts are to be performed by a party as a condition precedent to some right, or to perfect a right of action or property, and the act as performed is defective or imperfect, and the adverse party, whose right it is to object and insist upon a more perfect compliance with the condition, makes no objection to the manner of its performance, but accepting the performance as perfect, places his objection to the claim and right asserted upon another distinct and independent ground, he is held to have waived all objection to the formal or technical defects. * * * The rule rests upon the ground that the party by his silence has misled his adversary, and not having spoken when he ought, shall not be permitted to speak when he would. The principle has its most frequent application in actions upon policies of insurance, where there have been some defects in the preliminary proof of loss or of interest, which have not been objected to, but the claim has been resisted on other grounds."

CAN RECOVERY BE HAD ON A POLICY OF INSURANCE WITHOUT FIRST PAYING OR OFFERING TO PAY DELINQUENT AND UNPAID PREMIUMS?

The opinion of a majority of the court in the case of *Baxter v. Brooklyn Life Ins. Co., 119 N. Y. Rep., 450,* and cases adopting it, was followed as authority for a recovery of the insurance without first making payment or tender of delinquent premiums. The decision in that case was by a divided bench of four judges in favor and three in opposition. Andrews, J., with whom Earle and Gray, JJ., concurred, insisted that the payment or proper tender of delinquent premiums was a necessary condition precedent. From his opinion we quote as follows:

"But it is a condition precedent to the maintenance of such action that the plaintiff must, before suit brought, have paid or tendered the premium unpaid. The plaintiff, under the statute of 1877, is not required as before to show that it was paid or tendered on the day fixed in the policy, but he must aver and prove that payment was made at some time before the action was commenced, or else no right of action has accrued. This is in accordance with the well-settled rule that in mutual promises the plaintiff seeking to charge the defendant, must aver and prove performance on his part of that which was the consideration of the defendant's promise, and this as well where the promise of the plaintiff was to be performed before the day fixed for performance by the defendant, as where the performance of respective promises were concurrent and independent."

Loud v. Land Co., 153 U. S., 564.

Phillips Co. v. Seymour, 91 U. S., 646 (650).

There might be some more plausible ground for violating this rule of law and practice in states where the distinctions between law and equity are abolished than in the federal courts wherein such distinctions are definitely preserved.

This court has said concerning the nature of such a contract:

"It is an entire contract of life insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * * Each installment (premium) is, in fact, part consideration of the entire insurance for life. It is the same thing where annual premiums are spread over the whole life. * * * The whole premiums are balanced against the whole insurance."

Ins. Co. v. Statham, 93 U. S., 24 (30).
See also Kellner v. Ins. Co., 43 Fed., 623 (627).

Notwithstanding the statute of New York therefore, and even if it be held applicable to this contract, there became due from Mr. Sears to the company, May 18th, 1893, four hundred and ninety-one dollars, the annual premium then due, and that amount each succeeding year, including 1897, all of which remained unpaid and untendered at the beginning of this action. The allegation of the complaint is, that all of the conditions of the contract on the part of the insured, have been performed, or that each of these payments was duly made. The admission of the pleader is that none of them have been made, and the complaint is left destitute of allegations excusing the non-payment.

Thompson v. Ins. Co., 104 U. S., 252 (260).
Insurance Co. v. Unsell, 144 U. S., 439 (447).

In the former of these cases, the court says:

"A fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has heretofore failed to make a case for obviating and super-

seding the forfeiture of the policy, even if the circumstance relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all."

In the latter case, the beneficiary relied upon a waiver as excusing payment of the premium at the time the same was due and as defeating the right of the company's forfeiture; but there was evidence in this case that payment of the premium had been tendered subsequent to the due date. In discussing this question, Justice Harlan, at page 447, says:

"If the plaintiff had sued on the policies or certificates *without having paid or tendered the amount due to the company*, the non-payment of which, at the time stipulated, was relied on to prove that the policies had become forfeited, that *fact would have been fatal to a right to recover, in any view of the case.*"

DOES THE GENERAL STATUTE OF NEW YORK RELATING TO BUSINESS OF LIFE INSURANCE COMPANIES AFFECT THE MUTUAL LIFE INSURANCE COMPANY CHARTERED UNDER A SPECIAL STATUTE OF THAT STATE?

Now the question to be solved here, is whether the special act of the legislature of the state of New York of April 12th, 1842, entitled "An Act to incorporate The Mutual Life Insurance Company of New York," is affected by the general statute relating to insurance corporations transacting business in the state of New York. *(See Petition, pp. 1 and 2.)* This special act of the legislature is the charter of the corporation; it is the fundamental law which governs it, except so far as the same has been altered by statutes properly passed. It is true that Section 18 of this act provides that the legislature may at any time alter or repeal this act; but it never had altered or repealed it, except in 1851, when it passed an amendment to the act, which is of no importance here, and afterwards, in

April, 1862 when it passed another amendment to the act which is of no importance in this case. No other act has ever been passed by the legislature of the state of New York amending the special act of the legislature to incorporate The Mutual Life Insurance Company of New York. Certainly the general statute cited in the petition does not alter the charter of this company; certainly it does not decrease its power; certainly it cannot affect any of its rights under the contract which it made with the state. It is in violation of statutory construction to hold that a special act of the legislature is altered, amended or repealed by general legislation, unless particular reference is made to the special act, or it is otherwise made clearly manifest that the special legislation was intended to be embraced within the general act. It may be subjected, indeed, to the general provisions of law under the police power which the state has a right to enact.

THE PENAL CONSEQUENCES RESULTING FROM OBEYING THE NEW YORK STATUTE WILL NOT BE ENFORCED IN ANOTHER STATE.

This company is required by the statute to send a notice of the coming due of each installment of premium to the policy-holder or his assignee, and if the court finds it has failed to do so in this case, what is the consequence? It must pay the penalty. Is the state of Washington going to enforce the penal laws of the state of New York, and collect from its disobedient corporations the sums which they have been mulcted in, for doing or not doing something which the laws of New York require to be done or to be left undone?

The authorities holding that states will not enforce the penal laws of other states within their jurisdiction are too numerous to cite. We cite only those which hold that the United States courts sitting in other states enforce only the laws of the states

in which they are sitting, and will not enforce the penal laws of other states.

The Antelope, 10 Wheaton, 66.
Flash v. Conn, 109 U. S., 371.
Lyman v. B. & A. R. R. Co., 70 Fed. R., 409.
Huntington v. Attrill, 146 U. S., 657.
Texas v. Day Co., 41 Fed. R., 228.
Wisconsin v. Pelican Co., 127 U. S., 265.

We, therefore, argue that the general statute of New York respecting notice did not become a part of the charter of the insurance company and cleave to it going with it into other states and was not intended to affect either its being or its transactions outside New York.

American Bible Society v. Marhsall, 15 Ohio St., 543.

MEANING OF THE STATUTE OF NEW YORK.—WAS IT THE INTENTION OF THE LEGISLATURE TO PROTECT THE AMOUNT OF THE POLICY FROM FORFEITURE, IF NOTICE OF UNPAID PREMIUM WAS NOT GIVEN, OR ONLY SUCH PORTION THEREOF AS PREMIUMS ALREADY PAID HAD PURCHASED?

If the New York statute applies to this case and the penalties of failing to mail the notice prescribed by that statute are visited upon the corporation, what is the punishment? A mutual life insurance company is a mutual association of which every policy owner is a member, the corporation being but the agent or trustee of this association of individuals. By taking a life insurance policy and paying the annual premium he enters into partnership. One of the members of the association was entitled to have a certain statutory notice mailed to him by some agent of the corporation stating the amount of the premium or interest due on the policy, the place where the interest or premium is to be paid, and the person to whom the same is payable,

the notice to state that unless the premium or interest then due shall be paid to the company or duly appointed agent within thirty days after the mailing of the notice the policy will become forfeited and void. This notice is not deposited in the mail, but the member is otherwise fully possessed of all the information such notice can impart and so confesses. He fails to pay his premium, not for want of notice, but for want of money, and from that time forward suffers his premiums to go unpaid. Shall he, under such circumstances, make the want of formal notice, though possessed of actual notice, his excuse for taking advantage of his own failure to mulct his associates in damages to the amount of his failure? Is such the intent of the legislature?

To construe a statute properly there should be an appreciation of the exact quality of the evil against which it was aimed, its extent, and its mischief. If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute, then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all things, the statute must be construed in a spirit of justice. It must not be extended beyond the remedy which is sought to be enforced, and particularly it is not to be extended so as to do injustice, or inconvenience, or absurdity. We are not to suppose that the legislature, in attempting to remedy a wrong, itself committed a greater wrong, or that in its attempt to remedy a hardship it has committed injustice.

Now let us look at this statute in the light of these principles. Contracts of insurance are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid, annual, or semi-annual, or quarterly installments of premium are paid to

the company. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid, and that they should be so paid on the day they are due, because life insurance takes into account not only the average human life, but compound interest upon the installments which are paid. To leave out either element would destroy the scientific theory upon which life insurance is based. The contract is not for a fraction of a year, or from one installment period to another; although there is that sort of insurance, called "term insurance," and this statute expressly excludes that sort of insurance from its provisions. But the insurance for life is the insurance which we are now to deal with; and the policy before you in this case, which is the contract upon which the adjudication of this case is to be made, shows exactly what was to be done by both parties to the agreement. The contract is in two parts. One is a proposition in writing (the application) made in Tacoma, in the state of Washington, immediately prior to the 18th day of May, 1891, signed by Stephen P. Sears and addressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as an inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy.

The policy contains the following provision:

"*If this policy shall become void by non-payment of premiums, all payments previously made shall be forfeited to the company except as hereinafter provided.*"

Now, here is the forfeiture which the statute refers to, this is the forfeiture which it is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to continue a contract already in existence. The statute pre-

vents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute as that, not only is the forfeiture waived, which in this case amounted to two years' premiums, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance company which is unnecessary in order to accomplish the non-forfeiture of the premiums. It is not necessary to go to this length in order to sustain the statute. The statute was intended to provide that notice should be given of the recurrence of the payments, so that the policy-holder should not be taken by surprise, or affected by forgetfulness, oversight or sickness, and thus prevented from paying his premium on the very day it was due. It was an extension by the statute of an equitable interposition to prevent the forfeiture. This cannot be construed to bring about a greater forfeiture than it was made to prevent. It cannot be construed, without violating reason and justice, to mean that the policy-holder was forever discharged from his obligation to pay the premium because of the failure of this notice. There is something to forfeit. There is an accretion in the hands of the company of the surplus paid on each succeeding year the policy has been in force, which is forfeited unless the premium is paid. And to make sure the payment of which, the clause of forfeiture was inserted in the policy. *It is to prevent that forfeiture that the statute was passed; and in this case two years' premiums have been paid. To do equity between the parties, you must deduct from those two years' premiums the cost of carrying the insurance for two years as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the*

contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case. (See Record)

This is rendered clear by the decision of the Supreme Court of the United States in the case of the New York Life Insurance Company v. Statham, 93 U. S., 24. The policy in this case had become, by its terms, void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the condition of the country, being in a state of war with the southern states.

Says the court in that case:

"Non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

Then the court goes on to show that what there is in the hands of the company to be forfeited is surplus premiums over the amount which was necessary to carry the expired risk, and which is called in insurance circles the "reserve." That reserve is equitably the property of the insured; and when he is forced to go out of the company by the unforseen exigencies of war, he is entitled to take that amount with him.

That is all that could have been forfeited under any circumstances by the contract. Now the statute comes in and says that the company shall not forfeit that, unless it gives notice. This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die the whole amount of the insurance shall be paid over after deducting the back premiums. If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Sears did in this case, then the company would hear of him as it has heard in this case, with a claim for the amount

insured, without any attempt whatever to pay the premiums which are confessedly unpaid and in arrears. No legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium.

This statute is, as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute was exhausted upon the failure to give the notice in May, 1893, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1894. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given."

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premium on the ground of a continuous failure to give notice.

Fisher v. N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered. If, after suit was brought for the first penalty, the company did not avail itself of

the notice and cease its illegal action, a suit might be brought for another, but in the quaint language of Judge Grover, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

In this case, had we been informed of the failure to give notice, we could promptly have corrected the omission, but then Mr. Sears would have had to pay the premium within thirty days, which is just what he wanted to avoid.

A FATAL DEPARTURE FROM LAW TO LAW WAS MADE IN RENDERING THE JUDGMENT SOUGHT TO BE REVIEWED, BECAUSE THERE ARE NO PLEADINGS FOR SUCH A JUDGMENT TO BE BASED UPON.

The statute of New York was not pleaded nor the failure of plaintiff in error to comply with its provisions, nor was it even referred to in the complaint. Where the relief of the statute is relied upon as an excuse for non-performance, the statute itself becomes a necessary part of the pleading, as well as the non-compliance of the insurance company with its requirements, which relieves against the breach of conditions on the part of the insured.

Rosenplanter v. Provident Sav. Life Assur. Soc., 91 Fed., 728.

It is not a question as to whether the court takes judicial notice of the statutes of New York, but rather one of departure from law to law in the pleading. Whether a party who pleads a specific contract and performance on his part of its conditions as his right to recover shall be permitted after performance has been controverted, to confess his non-compliance and shift his right of recovery to an unpleaded statute of a foreign state and assert non-compliance with its provisions on the part of defendant, and adopt the defendant's non-compliance with the un-

pleaded statute as his own excuse for non-compliance with the conditions of the contract alleged in his complaint. The right of action alleged and abandoned is the act of the party; that not alleged but relied upon is the act of the legislature of New York. With performance of the conditions alleged the right of action is perfect regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. If the statute of New York, instead of performance of the conditions of the contract by defendant in error, affords the ground of recovery, then pleading of the statute is indispensible.

Union Pacific Railway v. Wyler, 158 U. S., 285.

In the case cited, a party sued the railway company for a personal injury, basing his right to recover upon the general law of master and servant. After the cause had been transferred to the Federal Court and remained in litigation for a number of years, the plaintiff amended his complaint so as to bring himself under the fellow servant act of the state of Kansas. Upon amendment being made, the defendant interposed the statute of limitations as to an original suit begun at the date of amendment. Mr. Justice White in delivering the opinion of the court, adopted the following definitions and illustrations of departure:

"Coke upon Littleton, 304 *a*, says: 'When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of Parliament. So when in his former plea he intituleth himself generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.'

"Comyn's Digest, 'Pleader,' (F. 8,) states the same rule, and gives the following illustrations of departure:

"'In debt on bond by sheriff against his bailiff to pay him 20d. for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for A; defendant rejoins Stat. 23 H. 6, and 3 G. it is a departure; for pleading he has had and rejoining he ought not to pay; and for pleading common law plea, and rejoining a statute. *Balantine v. Irwin, M. 4 G. 2, C. B. Fort. 368.*

"'So, if a man avows, for that A being seized in fee granted to him a rent, and the defendant pleads, nothing in the tenements at the time of the grant, and the plaintiff rejoins that A. was *cestuy que use* in fee, which use is now executed by the statute of uses; this is a departure.' *Pl. Com. 105 b.*

"Chitty on Pleading, *1, pp. 674, 675,* states the principle as follows: 'A departure may be either in the substance of the action or defence, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament.'

"Stephen on Pleading, *pp. 412, 413,* thus elucidates the point: 'These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also (a) departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law, in his declarations, and on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder.'

"Gould on Pleadings, *pp. 423, 424,* says:

"'When the matter, first alleged as the ground of action or defence, is pleaded as at common law, any subsequent pleading by the same party, supporting it by a particular custom, is a departure.' *(pp. 290-291.)*

And in applying the foregoing rules, says:

"A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce

an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the states the laws of other states are treated as foreign laws, which must be pleaded and proven. Sedgwick on Statutory and Constitutional Law, *363; Hempstead v. Reed, 6 Connecticut, 480; Swank v. Hufnagle, 111 Indiana, 453; Root v. Merriweather, 8 Bush, 397.* Although this rule is not invariably adhered to, it is part of the law as administered in the state of Missouri.

Babcock v. Babcock, 46 Missouri, 243.

"The suit here was brought in a Missouri court, and was necessarily controlled by the law of that state.

"It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. It is true that the Federal courts take judi-

cial notice of the laws of the several states. *Priestman v. United States, 4 Dall. 28; Owings v. Hull, 9 Pet. 607; Covington Drawbridge Co. v. Shepherd, 20 How. 227; Cheever v. Wilson, 9 Wall. 108; Junction Railroad v. Bank of Ashland, 12 Wall. 226.* This rule, however, does not affect the present suit, which was commenced in the court of Missouri. Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes which is a matter of evidence. The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute." *(pp. 295-296.)*

The preserved distinction between legal and equitable remedies in the Federal courts prevents such a departure as was made in this case. It is not contended one is entitled to insurance without payment at some time and in some form, of the premiums with which the insurance is purchased; it is not claimed that failure to give the statutory notice operates as a payment. How then, on a complaint that avers performance of all conditions, that is, payment of all premiums, is the common law court to enter into the field of accounting and ascertain what premiums have been paid and what have not, compute interest on the unpaid premiums according to the law of the forum of the state of New York, and render its judgment or decree for whatever equitable balance may be found due? Suppose such a practice adopted where a policy had been issued to a middle-aged person immediately upon the enactment of the statute of 1876, and but a single annual premium paid, and death occurred about this time and an action should be brought

upon that policy in the form adopted in this case. The aggregate of unpaid premiums and their accumulated interest would constitute an equitable setoff exceeding the amount of the policy. If, without pleadings framed for the purpose, the plaintiff is entitled to recover, why not the insurance company, the balance being in its favor?

THE STATUTE OF NEW YORK NEITHER ENTERING INTO THE CHARTER OF THE COMPANY NOR THE CONTRACT OF INSURANCE, WOULD NOT PREVENT THE PARTIES, SUBSEQUENT TO THE DELIVERY OF THE POLICY IN THE STATE OF WASHINGTON, FROM AGREEING AND CONSENTING TO DISPENSE WITH NOTICE.

By the terms of the contract it did not come into being till the premium was paid and the policy delivered at Tacoma; by the express terms of the contract, it is declared "Notice that each and every such payment (of premium) is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived." (Petition, pp. 6 and 7.)

Freedom of contract to the foreign corporation obtained in Washington. The laws of that state gave to such corporation authority "to do and perform every act and transact every kind of business within this state, in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of the state." (Petition, p. 4.) The statute of New York did not enter into this contract in Washington. The parties were beyond the reach of the policy of the state of New York, therefore they were at liberty in that state to make such after arrangement as was mutually agreeable respecting notice of the due date of premiums. It is admitted in the record, they adopted the express stipulation of the policy on the subject; it is ad-

mitted that when the third annual premium fell due, the assured refused to pay it, though advised as to its date and amount, and that the company noted and entered the policy upon its books as lapsed and forfeited for such default. It also stands admitted that the insured was informed of this action of the insurance company and acquiesced in it, and that by mutual consent and agreement the policy was treated as ended, and all future premiums were left unpaid; and on the faith of such arrangement and consent, The Mutual Life Insurance Company abstained from giving any notice. (Record, p. 17.)

IN THIS CASE THERE WAS NOT UNDER ANY ASPECT OF THE MATTER ANY OBLIGATION TO SEND NOTICE IN 1897, AND RECOVERY IS SHUT OUT BY THE AMENDMENT OF 1897 TO SECTION 92 OF CHAPTER 690 OF THE LAWS OF NEW YORK OF 1892.

(*a.*) Whether the Act of 1897 be regarded as a new law, or simply declaratory of what the pre-existing law was, it is clear that subsequent to the passage of that act, that is subsequent to April 8th, 1897, no notice had to be sent to Sears as he was not a resident of the State of New York.

This act provides that the notice shall be mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, "at his or her last known post office address in this State," that is, New York.

"The lower courts of the United States, and this court, "on appeal from their decisions, take judicial notice of "the constitution and public laws of each State of the "Union."

Mills *vs.* Gresn, 159 U. S., 657.

This act took effect April 8th, 1897, and Sears was alive on May 18th, 1897, when a premium became due and was not paid.

Under the doctrine of the Rosenplaenter Case, 96 Fed. Reporter, 721, hereinafter cited, whether the law of 1897 was a new law or merely declaratory of the existing law, no notice was required to be sent to Sears, and as he did not pay his premium on that day, the policy was lapsed and forfeited for failure to pay that premium, entirely irrespective of what had occurred previously.

On the theory of the plaintiff, if Sears was sent no notice on May 18th, 1893, and did not pay his premium at that time, his policy was not void and forfeited ; but the failure to send a notice could not possibly carry the policy any further that the payment of a premium would have carried it ; so that on the theory of the plaintiff by successive failures to send notices, even if there were successive failures to pay premiums in 1893, 1884, 1895 and 1896, his policy was carried in force up to May 18th, 1897, at that time, even on the theory of the plaintiff, the defendant was obliged to send no notice, and if he failed to pay his premium the policy was forfeited and lapsed.

In connection with this point (*a*) see discussion of effect of statute under (*b*).

(*b.*) Under the Act of 1897, if there is a controversy as to whether a premium is forfeited or not, such an action must be begun to determine such controversy within one year from the date of the default in the payment of the premium. In this case the default was on May 18, 1897, and no suit was begun until September 28th, 1898, some sixteen months afterwards. The final default took place May 18th, 1897. After the final default Sears, until his death, March 30th, 1898, and his executors thereafter, until

May 18th, 1898, had the right to litigate the propriety of such default, but not having done so their right to do so is barred. The reason upon which the statute is based clearly is that policy holders must pay their premiums on their due date, or must before a second premium becomes due, litigate any question of forfeiture arising out of the non-paymant of the previous premium.

The policy was issued May 18th, 1891, when the first annual premium was paid; the annual premium falling due May 18th, 1892, was paid, but no part of any premium subsequent to that time has ever been paid or tendered. The insured, Stephen P. Sears, died March 30th, 1898; action was commenced September 28th, 1898. It is thus seen that no premium had been paid for five years previous to the death of the insured, or for more than that time previous to the commencement of this action. It will be borne in mind that the express stipulation of the contract is, that non payment of the premium when due renders the policy void. If, then, a right of recovery exists, it must be through the statute of New York, and upon the terms prescribed by the statute, and the suit must be brought within the time prescribed by the law which constitutes a part of the statutory right. It is through the grace of the legislature of New York that the right of action upon the forfeited policy is given, if at all, and one who relies upon it must bring himself within the terms of that statute; one of which is the time of taking advantage of the favor it bestows.

The amendment by Chapter 218, Laws of 1897, is as follows:

"No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the

premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued." (Petition, pp. 3 and 4.)

Though it be held that the policy remained alive for want of the statutory notice, it is none the less true that default was made in payment of the premiums due in each of the years 1893, 1894, 1895, 1896 and 1897, and has so continued to this date. The legislature of New York, as has been shown, did not touch the contract and its obligations, and did not enter into the charter of the company. This statute would, in case the business was transacted in the State of New York, relieve the insured against the consequences of a violation of his contract. By the express stipulation of the policy it became lapsed and forfeited by the non-payment of the premium when it fell due; but notwithstanding such forfeiture, the insurance company was forbidden to take advantage of it and declare the contract forfeited and lapsed, unless it mailed a certain notice; although the forfeiture had occurred, the company was, in a case where the statute applied, prevented from availing itself of that forfeiture or declaring it, till a proper notice was mailed. The insured did not pay his premium in the company's failure to give the notice. He was only relieved from the consequences of his violated contract. It is none the less, by its own terms, a forfeited policy, though the insurance company is not permitted to declare it such without first mailing the statutory notice. The language of the statute is: "No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed." (Petition, p. 2.) The "forfeited policy" in contemplation of the amendment of April, 1897, is that policy upon which the premium has not been

paid according to its terms, and such is the forfeited policy in the sense of the statute amended.

This view of the statute is clearly brought out in *Rosenplanter* v. *Provident Savings Life Assur. Society* before cited, 96 Fed., p.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to renew the policy by the payment of the stipulated premium, but that the forfeiture should not be declared or be effective unless the default in the payment of the stipulated premium should occur after a particular notice had been given prior to the stipulated day of payment, or a default should continue after a particular notice and demand for payment had been given. Thus the law stepped in and in effect said: 'You shall not enforce the stipulations into which you have entered in respect to the effect of a default in payment of premiums unless you first comply with this statute by giving the notice herein required.' The subsequent repeal of this statute does not impair the obligation of the contract in respect to premiums which should mature thereafter. The repeal simply permits the contract into which the parties had entered to be enforced according to its own terms and conditions."

If it should be claimed that the policy was issued prior to the amended statute of 1892 and therefore that statute and its amendment of 1897 are not applicable, the objection is met by the fact that it was "renewed" after the enactment of 1892. Without the payment of the annual premium the policy lapses, but by means of such payment it is restored, reinstated, continued, or, in the language of the statute, renewed; such is the interpretation given by the courts of New York to this word as employed in the statute.

We quote from *Carter* vs. *Brooklyn Life Ins. Co.* (*110, N. Y., 15*), *17 N. E., 396 :*]

" We are also of the opinion that the payment of each annual premium constituted a renewal of the policy within the meaning of the term "renewed" as used in the act. While it was provided by the policy that it should continue for the term of the natural life of the insured, it was expressly provided that this was upon the condition that he should pay the annual premiums as they became due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void and of no effect ; but, when paid, it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease or a contract, it is not essential to wait until they have respectively expired ; for, after that time, it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its proper sense, is to refresh, revive, or rehabilitate an expiring or declining subject ; but is not appropriate to describe the making of a new contract, or the creation of a new existence. Webst. Dict. ; Worcest. Dict. It would be at the option of an insurance company to re-execute a forfeited contract of insurance ; and, if the act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the act to

make it apply to some existing policies, and confer some legal right upon their holders, to avoid a cause of forfeiture ; and, if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should be any renewed policies thereafter or not. We are therefore of the opinion that the plaintiff's policy was renewed within the meaning of the act" (p. 399).

And such is the view adopted in *Rosenplanter* vs. *Provident Life Insurance Co.*, cited from above.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to *renew* the policy by the payment of the stipulated payment."

The right of action being derived through the statute, the time in which it must be brought becomes a part of the statutory right, and unless suit is instituted within such time the right of action is lost.

In distinguishing the rule of limitation with respect to actions given by the common law and those under the statute, in *Finnell v. Southern Kan. Ry. Co., 33 Fed., 427*, the court says :

There is also another class of cases in which a cause of action, which does not exist at common law, is created by the laws of a state. Causes of action of that character only exist in the manner and form and for the length of time prescribed by the statutes of the state which created them, and if suit is brought on such causes of action in a foreign jurisdiction the limitation act of the state which created the cause of action may, of course, be pleaded (p. 428)."

And in *The Harrisburg, 119 U. S., 199*, this Court expresses the rule as follows :

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is

brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right" (p. 214).

CONCLUSION.

Certiorari is a permissible remedy in a case like the one here presented. We cite as alike in principle the case of *Wabash Western Railway v. Brow, 164 U. S., 271.* We further call attention to *Saltonstall v. Birtwell, 164 U. S., 54,* wherein it having been held that the right of an importer to recover excessive duties exacted could not be recovered unless it was shown protest had been made at the time of payment (though made afterwards and within ten days after the ascertainment and liquidation of

duties), and the judgment being affirmed by the Circuit Court of Appeals, this Court granted a writ of certiorari, while in the case of "*The Kate*," *164 U. S., Rep. 458*, certain questions being certified to this Court, it caused the whole record to be brought up in order to determine a case involving, as we apprehend, questions of less gravity and less importance, and tending less to establish uniformity of decision than the case at bar.

Telfener v. Russ, *162 U. S. Rep., 170*, was an action by Russ, the holder of a contract to purchase large tracts of land from the State of Texas, against Telfener, to whom he had sold and assigned his contract, upon an alleged breach of the contract of assignment. A writ of certiorari was issued to the United States Circuit Court of Appeals for the Fifth Circuit.

So, also, in *Dashiell v. Grosvenor*, *162 U. S. Rep., 425*, a patent infringement case where the decision of the Circuit Court of Appeal is final, as in the other cases cited.

In *The Conqueror*, *166 U. S., 110*, this court issued its writ of certiorari, where the questions were involved as to whether a certain foreign built vessel purchased by a citizen of the United States and brought into the waters thereof, was taxable under the tariff laws of the United States, and what was the proper measure of damages suffered by reason of the detention during the time of seizure of such vessel. While In re Chetwood, the court, making the rule absolute in allowing a certiorari where the Circuit Court exceeded its jurisdiction in judging certain parties guilty of contempt in violating the order of the court, made use of the following language (*165 U. S., 443*):

"By section 14 of the Judiciary Act of September 24, 1789 (*1 Stat. 81, c. 20*), carried forward as section 716 of

the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress ' to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law'; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co.* v. *Jacksonville Railway, 148 U. S., 372, 380.* And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, *c. 517, 26 Stat. 826*, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice."

Regarding the differences of judicial opinion respecting a number of the questions raised, and the unsettled rule as to a number of the other questions presented, as well as the importance of a decision affecting a number of cases presented contemporaneously to this court, by petitioner, and still others pending in the Circuit Court of Appeals of the Ninth Circuit, and in the Circuit Court for the District of Washington, in which your petitioner is a party, as well as the importance of a decision affecting policies of The Mutual Life Insurance Company of New York, and other life insurance companies similarly circumstanced, it is respectfully urged that a writ of certiorari be issued out of this honorable court to bring the record and cause before it, in order that it may decide the entire matter in controversy, as if the case had been brought before the court by a writ of error.

This Court in the case of Phinney, Executors *v.* The Mutual Life Insurance Company of New York, No. 12 on

the present calendar of this Court, granted a writ of certiorari, and the Phinney case has been passed for special cause, and will be argued in the spring of 1900. The questions involved in this case *are to some extent* the same class of questions as those in the Phinney case now before this Court, though later and different statutes are also under consideration, and it is respectfully urged that this is an additional reason for the Court having before it at the time the Phinney case is argued, other cases involving similar points arising out of kindred statutes.

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No. 452.

MAR 13 1900
JAMES H. McKENNEY,
Clerk

SEARS

Filed Mar. 13, 1900.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

BESSIE SEARS, as Executrix of the Last Will and Testament of STEPHEN P. SEARS, deceased,

Defendant in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. In Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
Of Counsel.

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Respondent & Defendant in Error.

No. 452.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error.

Preliminary Statement.

There is no difference between this case and the Phinney case so far as the Acts of 1877 and 1892 are concerned, but the

questions of waiver abandonment and estoppel arise upon demurrer on the facts admitted, and in addition the effect of the Act of 1897, and the express limitation therein to post-office addresses within the State of New York, and the effect of the one year bar therein are involved herein.

I.

Statement of Proceedings in Court Below.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on the 28th day of September, 1898, to recover the sum of Ten thousand dollars ($10,000) with interest from June 23d, 1898, claimed to be due on a policy of life insurance issued by The Mutual Life Insurance Company of New York (Rec., 1, 9).

The answer was demurred to by the plaintiff and the Court sustained the demurrer to the answer and ordered judgment for the plaintiff, Sears, in the sum of Seven thousand seven hundred and forty-eight dollars and ninety-four cents ($7,748.94) (Rec., 22).

The defendant excepted to the judgment. (Record, p. 23).

No opinion was rendered by Hanford, J., in sustaining the demurrer and ordering judgment.

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District, and the judgment was there affirmed.

For opinion of Circuit Court of Appeals by Hawley,

District Judge, concurred in by Gilbert and Ross, Judges, see Record, page 45. Also reported in 97 Federal Reporter, page 986. This opinion says little more than that the case is governed by the decision in the Hill case.

In November, 1899, a petition for a writ of *cetiorari* was filed by the defendant Company in this Court, with a certified copy of the record and brief. This petition and brief were submitted to this Court with brief for Sears opposing application for *certiorari*. (See papers on file.)

Writ of *cetiorari* was thereafter granted by this Court February 5th, 1900, and filed.

This cause now comes before this Court on a writ of *certiorari* for hearing on the merits.

II.

Abstract of Pleadings.

The Complaint.

The complaint in this action alleges that Sears was a resident and citizen of the State of Washington.

That on the 18th day of May, 1891, the defendant company executed and delivered in the City of New York the policy in question, and that the application for said policy contained an agreement and condition that the application was made subject to the charter of the Company and the laws of New York.

That on March 30th, 1898, Sears died in the State of Washington.

That during the lifetime of Sears he duly performed all the conditions of the contract.

The following clause appeared in the policy attached to the complaint :

PAYMENT OF PREMIUMS.—Each premium is due and payable at The Home Office of the Company in the City of New York ; but will be accepted elsewhere when duly paid in exchange for the Company's receipt, signed by the President and Secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which it is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the Company except as hereafter in provided.

That the plaintiff as Executrix had duly complied with all the conditions of the contract necessary to be complied with.

The complaint was sworn to the 19th day of September, 1898.

The Answer.

The plaintiff in error answering admits the issuance of the policy but denies that the contract was made or delivered in the City or State of New York, and further denies that all the conditions of the contract were performed, and alleges affirmatively.

1st. That the application was made in the State of Washington and the policy delivered in the State of Washington, and the first annual premium of $491 paid thereon in the State of Washington, by Sears.

2nd. That the premiums due on the 18th days of May, 1892, 1893, 1894, 1895, 1896 and 1897 had not been paid, that the policy by its terms had therefore become forfeited. (Record, 15.)

Third.—That subsequent to May 18th, 1893, and when the second premium was not paid, Sears with full information of the lapsing of the policy refused to pay the premium in default and thereby restore the policy after such default, elected to have the same terminated and that the defendant relying on such election of Sears at all times treated the policy as lapsed, and relying upon Sears conduct abstained from taking any further steps in regard to said policy by way of notice or otherwise. (Record, p. 18).

The Demurrer.

The plaintiff demurred to the first and second affirmative defenses and to the answer generally on the ground that the same did not state facts sufficient to constitute a defense to the complaint (Record 20).

III.

Chronological Statement of Facts Admitted by Pleadings.

1877. Act of 1877 passed.

1891, May 18th. Sears, a resident and citizen of the State of Washington, executed an application at Seattle, Washington, to the defendant company for a policy of insurance on his life, for the sum of $10,000, payable to his executors, administrators and assigns. This application was forwarded to the Home Office, in the city of New York. Pursuant to such application a policy as applied for by Sears was issued, and forwarded from the Home Office in New York to the agent at Seattle who delivered it to Sears upon payment of the first premium.

1892, May 18th. Premium not paid.

1892, Oct. 1st. Law of 1892 went into effect.

1893, May 18th. Sears, with full information of the lapsing of the policy, refused to pay the premiums in default, and thereby restore the policy after such default, elected to have the contract terminated, and the defendant, relying on such election of Sears at all times, treated the policy as lapsed, and, relying upon Sears' conduct, abstained from taking any further steps in regard to said policy by way of notice or otherwise.

1894, May 18th. Premium not paid.

1895, May 18th. Premium not paid.

1896, May 18th. Premium not paid.

1897, April 8th. Law of 1897 went into force.

1897, May 18th. Premium not paid.

1898, March 30th. Sears died in the State of Washington.

1898, Sept. 28th. Suit commenced.

IV.

Statement of the case required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised.

The first question is, whether the Statutes of New York of 1877 and 1892 applied or not to the business of collecting premiums from non-residents which are not demanded to be paid within the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors (See Point I).

The second question is, whether or not under the circumstances the policy was or was not a Washington contract governed and construed by the laws of Washington alone, and not by the Statutes of New York in question.

The question is raised by the sustaining of the demurrer to the answer and the assignment of errors (See Point II).

The third question is, whether if the premium notice statutes of New York applies, their equitable and true construction aids the plaintiff in keeping the policy alive. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point III).

The fourth question is, whether or not such premium notice as might be applicable to the Sears policy and the premium due May, 1897, was the Statute of 1897, passed April 8th, 1897. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point IV).

The fifth question is, whether or not the Sears policy did not become lapsed and forfeited beyond any question on May 18, 1897, by its terms, by reason of non-payment of the premium falling due on that day, because by the express provision of the Act of 1897, no notice was necessary, as Sear's post-office address was not in the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point III).

The sixth question is, whether if any statutory notice was required the sending of notice was not waived by Sears, by the terms of the policy and whether actual knowledge of the due date of the premium possessed and acted upon by him obviated the necessity for statutory notice. The question was raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point VI).

The seventh question is, whether or not the policy in question was not terminated by waiver, estoppel, abandonment and recission and the question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point VII).

The eighth question is, whether or not it is essential to the maintenance of this action that Mrs. Sears should have paid or tendered the premiums before suit and should have pleaded both that fact and the Acts of 1877 and 1892. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point, VIII).

V.

Statement of questions in issue as presented in the petition for the writ of certiorari.

FIRST.

Whether the statutes of New York of 1877, 1892 and 1897 respectively apply at all to the State of Washington or in any event to this case where the policy was delivered and the first premium paid in the State of Washington.

SECOND.

Whether if the policy was delivered in the State of Washington and there became a binding contract, it was lawful for the parties to provide in it for a waiver of notice of the due date of premiums.

THIRD.

Whether the New York statutes are merely ones of regulation, effective only within the State of New York, or whether they were when in force respectively a part of the

charter of your petitioner, and limited its powers of contracting outside the State of New York, and whether it was competent for the parties in an agreement subsequent to the delivery of the policy to enter into another agreement by which they dispense with the notice prescribed by the New York statutes if the same applied.

FOURTH.

Whether confessed knowledge of the amount of premiums and the date of their payment, and an express refusal on the part of the insured to make payment obviates the necessity of statutory notice, if the same is required.

FIFTH.

Whether the statutes of New York of 1877, 1892 and 1897 respectively, being of a general nature, apply to your petitioner, a corporation created and chartered under a special act of the Legislature of that State.

SIXTH.

Whether the policy of the State of Washington according freedom of contract should be a controlling reason for holding this policy a Washington instead of a New York contract.

SEVENTH.

Whether the failure to give notice of a particular premium maturing under the acts of 1877, 1892 and 1897 respectively will have the effect of keeping the policy alive, notwithstanding all subsequent premiums have been knowingly left unpaid by the insured.

EIGHTH.

Whether even if the statute of 1877 applied at all it did not apply only to the premium due May 18th, 1892, which was paid, and whether the statute of 1892 if it applied at all did not apply only to the premium due dates respectively May 18th, 1893, May 18th, 1894, May 18th, 1895, and May 18th, 1896, and whether the statute of 1897 if this series of statutes applied at all, did not apply to the premium due May 18th, 1897, and whether if the statute of 1897 applied to the premium due May 18th, 1897, there was no obligation to send any notice, because Sears was not a resident of the State of New York.

NINTH.

Whether, although your petitioner failed to give the notice under the Acts of 1877, 1892 and 1897 respectively (if required), and all subsequent premiums due prior to the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property, without consideration, to require your petitioner in case of the death of the insured to pay the policy.

TENTH.

In event it should be held the statutes of New York of 1877, 1892 and 1897 respectively, apply to this case, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

ELEVENTH.

Whether, in this action, pleading only the policy of in-

surance, and a performance by the insured of its conditions and without pleading the statutes of New York of 1877, 1892 and 1897 respectively, a recovery can be had when plaintiff admits non-payment of all premiums subsequent to the first up to the death of the insured.

TWELFTH.

Whether it is not a fatal departure from law to law for a plaintiff, alleging as his cause of action a policy of insurance and compliance with its terms, and admitting the defense of non-payment of premiums, to recover judgment because defendant has failed to show compliance with the statutes of New York of 1877, 1892 and 1897 respectively (if the same apply) in regard to mailing notice of the due date of premium, notwithstanding said statutes have not been pleaded by either plaintiff or defendant in the case.

THIRTEENTH.

Whether, in this action, the statute of April, 1897 (which declares "no action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof, for which it is claimed thas the forfeiture ensued"), precludes a recovery in this case, the action having been commenced on the 28th day of September, 1898, more than one year from May 18, 1897, the last premium due date before death.

FOURTEENTH.

Whether under the charter of the defendant Company

and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the Company.

VI.

Specification of Errors.

The following are the errors assigned by the plaintiff in error, and upon which it relies for the reversal of this cause.

I.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the first affirmative answer and defense of defendant and plaintiff in error (Assignment of Errors, I, Record, p. 24).

II.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the second affirmative defense of the plaintiff and defendant in error (Assignment of Errors, II, Record, p. 24).

III.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the answer of the defendant and plaintiff in error (Assignment of Errors, III, Record, p. 24).

IV.

The said Court erred in granting judgment in favor of plaintiff and defendant in error against defendant company and plaintiff in error for the amount of said judgment, or any sum, because it was manifest upon the issues formed in said cause that said plaintiff and defendant in error was not entitled to judgment (Assignment of errors IV, Record, p. 24).

V.

The said Court erred in not submitting said cause to trial upon the issues formed by the pleadings (Assignment of errors V, Record, p. 25).

POINT I.

The premium notice statutes of New York of 1877 and 1892 never had any application to the Sears' policy, because those statutes did not apply to the business of collecting premiums demanded to be paid outside the State of New York. The contract was not subject to these particular statutes of New York, because by their true construction they had no application.

For argument in support of the above, see Phinney brief, Point II, page 59, and Cohen brief, Point I.

In the Sears case' it is admitted by the demurrers to the answer that the premium paid on the policy was paid in the State of Washington, and that it was only then and there that the policy became operative and a binding contract between the parties; and it is further admitted that the transactions respecting the non-payment of the premium due in May, 1892, and thereafter took place in the State of Washington.

Under the doctrine advanced in the Phinney Brief and the Cohen Brief, Sears was never entitled to any notice; and from this point of view the whole series of premium notice statutes is irrelevant in connection with the Sears' policy.

POINT II.

Under the circumstances surrounding the application, issuance and delivery of the Sears' policy in the State of Washington it was a Washington contract and under the true doctrine of the conflict of laws the New York statutes of 1877 and 1892 were not the law of this contract.

For argument on this point see Phinney Brief, Point III, at page 79; also Cohen Brief, Point II. See also the opinion of the California Court in the case of Rosson *v.* Equitable appended to the Cohen Brief.

POINT III.

But if this Court should hold contrary to our contention in Point I as above, that the statutes of 1877 and 1892 apply to this contract and to the business of collecting premiums outside the State of New York, then it is submitted that the equitable and true construction of the statute so found applicable is that the statutes operated on the first default alone without notice and did not preserve the contract forever on successive defaults, and further that the forfeiture of the premiums already paid was all that was prohibited.

For argument on this point see Point IV in Phinney Brief, page 94, and also Point III in the Cohen Brief.

POINT IV.

Should the Court notwithstanding points I. and II. above hold that the Statutes of 1877 and 1892 governed the business of collecting the Sears' premiums and that the operation of these statutes was not as contended for in Point III above, then

The Premium Notice Statute, if any, applicable to the Sears' policy after April,

1897, was the statute of April 8th, 1897, and the policy became lapsed and forfeited on May 17th, 1897, one year after May 18th, 1896, the date of the last default before the passage of the Act.

(*a.*) The Statute of 1897 is applicable after April 8th, 1897.

(*b.*) The Sears policy became lapsed and forfeited on May 17th, 1897, one year after May 18th, 1896, the date of the last default before the passage of the act.

See Cohen Brief, Point IV, *a* and *b*. In the Cohen Brief we said that the first default was June 11th, 1893, so that no question could possibly arise in that case on the effect of the saving clause in the Act of 1892 referred to by Hanford, J., in the recent Hathaway case. In this case, however, the first default was May 18th, 1892, and the act did not take effect until October 1st, 1892, so that the saving clause may be adverted to by opposing counsel.

The "Saving Clause" in the Act of 1892 has no bearing on the Sears case, because there were defaults in paying premiums subsequent to the passage of that act.

In the Hathaway case the policy was issued January 26th, 1892, no premium was paid January 26th, 1893, or thereafter, and the insured died April 15th, 1898.

When the policy was issued the act of 1877 was in force, and before the second premium was due the act of 1892 went into force.

HANFORD, J., apparently uses the saving clause in the act of 1892 for the purpose of holding that the act of 1877 always applied to the policy, yet he is not very clear on

this point, for he says "that the question to be decided in "the case is whether the amendment of the law of 1892 by "the act of 1897 had the effect to terminate the contract "between the parties immediately, and to bar an action "upon the policy after the death of the insured, which "occurred subsequent to the date of said statute."

The contention of this plaintiff in error is that there is nothing in the saving clause of the act of 1892 which prevents the application of the doctrine of the Rosenplanter case to the Hathaway and Sears cases.

The claim of the Court in the Hathaway case apparently is that the saving clause operates to continue the act of 1877 as applicable to then existing policies.

The "Saving Clause" and "Construction" sections, referred to by Hanford, J., are sections 291 and 292 of Chapter 28 of the General Laws (Being Chap. 690 of the Laws of 1892). They are in full as follows:

> "Sec. 291. SAVING CLAUSE.—The repeal of a law, or any part of it specified in the annexed schedule, shall not affect or impair any act done, or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to October 1, 1892, under or by virtue of the laws so repealed, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such laws had not been repealed; and all actions or proceedings civil or criminal, commenced under or by virtue of the laws so repealed and pending September 30, 1892, may be prosecuted and defended to final effect in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law."
>
> "Sec. 292. CONSTRUCTION.—The provisions of this chapter so far as they are substantially the same as those of laws existing on September 30, 1892, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this

chapter and not as to new enactments, and shall be applicable to all corporations formed under laws repealed by this chapter. References in laws not repealed to provisions of law incorporated into this chapter and repealed, shall be construed as applying to the provisions so incorporated. Nothing in this chapter shall be construed to amend or repeal any provision of the Penal or Criminal Code."

The court will observe that this is not a "Saving Clause" appended to a repeal of the premium notice statute of 1877 alone. That statute is but one of 163 statutes on a vast variety of insurance subjects, all repealed, so that it does not necessarily apply at all to the act of 1877.

Indeed the Commissioner's Report on the Statutory Revision in their note to proposed Section 291 refer specifically to certain insurance statutes of 1853, 1857, 1879 and 1886, and saving clauses in those statutes as the ones codified in § 291.

The Circuit Court of Appeals in the Sixth Circuit in the Rosenplaenter case expressly allude to this Section 291, and say: "Section 291 of this act provides that no right "acquired or accrued, or penalty or forfeiture incurred, "prior to October 1, 1892, should be affected by the repeal "of the laws therefrom in force, but otherwise manifestly "subjects policies then in force to be Act of 1892, in re-"spect of payment of premiums thereafter falling due."

In the Rosenplaenter case the first default was in October, 1891 (when the Act of 1877 was in force), and the last default before death was in April, 1894 (when the Act of 1892 was in force), but the Court held no notice necessary under the Act of 1892, and thus construed the "Saving Clause" as having no effect upon prior defaults, and as *there was subsequent defaults*, this was of course proper.

The facts in the Sears' case are similar. In that case the policy was issued May 18, 1891, and the first default

was in May, 1892 (prior to passage of Act 1892), and Sears died March 30th, 1898. So that, as in the Rosenplaenter case, the "Saving Clause" has no effect upon the prior default, there being *subsequent* defaults controlled by the Acts of 1892 and 1897.

The "Saving Clause" might be effective in a case where there was a prior default and no notice, and then no *subsequent* defaults after the passage of the act of 1892.

For instance, suppose a default without statutory notice in December, 1891, under the Act of 1877, and then a death in November, 1892, after the Act of 1892. To such a case the "Saving Clause" would apply, and in a case where the Act of 1877 was applicable there would be no forfeiture, and the effect of the Act of 1877 would not be gone, although the act was repealed.

If the Act of 1877 applied to the Phinney case then the "Saving Clause" might have operated in that case (barring questions of waiver, abandonment, etc.), for the first default was in 1891, and the second in 1892, before the Act of 1892, and then Phinney died.

The "Saving Clause" has no possible application to the other cases before this Court.

In the Allen case the policy was not issued until 1893.

In the Cohen case there was no default until 1893.

In the Hill case, Hill died in 1890.

POINT V.

If the Sears policy did not become lapsed and forfeited on May 17, 1897, one year after the premium due May 18, 1896, because a year had not yet elapsed from April 8, 1897, yet it became lapsed and forfeited on May 18, 1897, by its terms, for on that day default was made, and by the express provisions of the act no notice was necessary because Sears' post office address was not in the State of New York.

For argument on this see also Cohen brief Point V.

Whether the Act of 1897 be regarded as a new law, or as a simply declaratory of what the pre-existing law was, it is clear that subsequent to the passage of that act, that is subsequent to April 8, 1897, no notice had to be sent to Sears, as he was not a resident of the State of New York.

This act took effect April 8th, 1897, and Sears was alive on May 18th, 1897, when a premium became due and was not paid.

Under the doctrine of the Rosenplaenter Case, 96 Fed. Reporter, 721, whether the law of 1897 was a new law or merely declaratory of the existing law, no notice was required to be sent to Sears, and as he did not pay his premium on that day, the policy was lapsed and forfeited for failure to pay that premium, entirely irrespective of what had occurred previously.

On the theory of the plaintiff, if Sears was sent no notice on May 18th, 1893, and did not pay his premium at that time, his policy was not void and forfeited; but the failure to send a notice could not possibly carry the policy any further than the payment of a premium would have

carried it ; so that on the theory of the plaintiff by successive failures to send notices, even if there were successive failures to pay premiums in 1893, 1894, 1895 and 1896, his policy was carried in force up to May 18th, 1897, but at that time, even on the theory of the plaintiff, the defendant was obliged to send no notice, and if he failed to pay his premium the policy was forfeited and lapsed.

In both the Cohen case and the Sears case a premium became due after April 8, 1897, during the lifetime of the insured ; in the Cohen case on June 11, 1897, and in the Sears on May 18, 1897.

In the Cohen case the first default was June 11, 1893, so that no question could possibly arise in the Cohen case as to the effect of the saving clause in the Act of 1892 referred to by Hanford, J., in the recent Hathaway case. In the Sears case, however, the first default was May 18, 1892, and the act did not take effect until Oct. 1st, 1892, so that the saving clause may be adverted to by opposing counsel and it is discussed in Point II above.

UNDER THE MOST EXTREME VIEW THAT CAN BE TAKEN THE DEFENDANT IN ERROR SEARS CANNOT RECOVER, BECAUSE THE ACTION WAS NOT BROUGHT WITHIN ONE YEAR FROM JULY 18, 1897.

For argument on this point see Cohen brief Point V.

POINT VI.

If the Court holds that the true construction of the statutes of 1877 and 1897 required a notice to be sent Sears unless waived, then it is claimed by the plaintiff in error the sending of any statutory notice was waived by Sears by the express terms of the policy, and that actual knowledge, possessed and acted upon by Sears, obviated the necessity for statutory notice.

For argument on this point, see Point V of Phinney Brief, page 116, and Cohen brief, Point VI.

It is admitted in the case that subsequent to the failure of Sears to make payment of the premium falling due May 18th, 1893, and subsequent to the lapsing of the policy for failure to make payment, and after Sears was fully informed and knew that his policy was lapsed and void, the defendant Insurance Company applied to Sears to make restoration of his policy, by making payment of pemiums in default, and having the policy restored; and it is further admitted that Sears refused to make any such payment and refused any longer to continue the policy or make any further payments on it, and elected to have the policy terminated; and it is further admitted that the Life Insurance Company, relying upon such election and determination of Sears, treated the policy as lapsed, abandoned and terminated, and relying upon Sears' conduct abstained from taking any further action or step in relation to the policy by way of notice or otherwise in order further to effect its cancellation and termination.

POINT VII.

The contract was abandoned by Sears and this he had a right to do so.

For argument on this point see Phinney Brief, Point VI, page 143.

This policy was payable to Sears, executors or administrators. It is admitted that Sears had full information that his policy had become void, and that with this knowledge he was applied to by the defendant to have his policy restored, but that Sears refused to do so, and elected to have his policy terminated, the company relying upon such election, treated the policy as lapsed, and abstained from taking any further steps in regard to it (Rec., p. 18).

The Circuit Court of Appeals says (Rec. 47) that the parties could not waive the provisions of the statute of New York which expressed the conditions upon which the policy might be forfeited for non-payment of premiums. Whatever view the Court may hold as to an express agreement to waive the statute in advance, there can be no question but that after default the parties interested can contract respecting the policy. The doctrine of the Court of Appeals would prevent an agreement surrendering the policy to the company in all cases where no notice had been sent, while the policy would be kept alive and be non-terminable against the will both of the insurance company and the sole party interested, which would be absurd.

In his brief in opposition to the writ of certiorari counsel claims that had Sears paid $246 more (the record shows $491 as payable) he would have been entitled to paid up insurance for $3,000, or a policy for $10,000 extended insurance for nine years. This is incorrect.

Sears was not entitled to any extended insurance under any circumstance. He had paid two years, and he had had his insurance for two years for $10,000.

Counsel also claims that Sears was given no opportunity to pay, and that the company does not pretend it was misled by Sears' conduct, or refrained from sending notice on account of such conduct. The *admitted* facts above referred are just the contrary of these claims.

POINT VIII.

The alleged cause of action was not pleaded and there was a departure. See Phinney brief; Point VII.

POINT IX.

The judgment should be reversed.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. MCKENNEY,
Of Counsel.

Nos. 452, 453, 454 & 455.
FILED
MAR 26 1900
JAMES H. McKENNEY,
Clerk.

Sup. Ct. Bf. of Davies, Short, Allen & McKenney for Petitioner

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 20, 1900.

Nos. 452, 453, 454, 455.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR AND PETITIONER,

vs.

COHEN.

SAME *vs.* HILL.

SAME *vs.* SEARS, EXECUTRIX, &c.

SAME *vs.* ALLEN, ADMINISTRATOR, &c.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR AND PETITIONER, FILED BY LEAVE OF COURT.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
For Mutual Life Insurance Company.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-20-1900

IN THE

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Supplemental Brief of Plaintiff in Error and Petitioner, Filed by Leave of Court.

Should the court uphold either Point II, III, IV, V, VI, or VII of the brief in the Phinney case (No. 12), the above causes will be disposed of with like result as in that case, except that Point III does not apply to the Hill case, as the application for that policy contained the provision that the contract of insurance when made should be held and con-

strued at all times and places to have been made in the city of New York.

It is desired to add here a few considerations pertinent to these cases and applicable to the above points, and also to present some views on questions arising under the act of 1897 applicable to the Cohen and Sears cases and not fully elaborated in the main Cohen brief.

The following summary is made for the convenience of the court:

Hill Case.

The date of the Hill policy is April 29, 1886; amount, $20,000. The first annual premium was paid upon delivery of policy. The second, third, and fourth annual premiums were not paid. Hill, the insured, died December 4, 1890. The beneficiaries were the wife, if living; if not, such of the children as might be living upon the death of the insured. Suit was commenced October 19, 1895.

Sears Case.

Date of policy, May 18, 1891; amount, $10,000; payable to executors, administrators, or assigns.

The annual premium due May 18, 1892, was paid, but the third, fourth, fifth, sixth, and seventh annual premiums were not paid. Sears, the insured, died March 30, 1898. Suit was commenced September 28, 1898.

Allen Case.

Date of policies (2), February 18, 1893; amount, $2,500 each; payable to executors, administrators, or assigns.

The first annual premium was paid. The second, third, fourth, and fifth were not paid. Stewart, the insured, died July 9, 1897. Suit was commenced December 28, 1897.

Cohen Case.

Policy dated June 10, 1888; amount, semi-endowment of $1,500 to himself if living at the expiration of ten years; in case of death before that time, $3,000 payable to wife, Fine Cohen.

Premiums were paid to June, 1892. All subsequent premiums were not paid. Death occurred September 21, 1897. Suit was commenced November 29, 1898.

POINT I.

The widow of Cohen and the children of Hill, beneficiaries in the respective policies, not having paid or caused the premiums overdue to be paid, are concluded by the conduct, statements, and omissions of the insured.

It is to be remembered that in each of these two cases the insured himself made the application for the insurance; the contract was between him and the company; the premiums, so far as paid, were paid by him alone; to him was delivered the policy, and, for aught in the record to the contrary, in his possession it remained.

Under such state of facts, we think the following conclusions must be accepted:

a. That there was no obligation on the part of the insured to pay premiums longer than he wished, and that the beneficiaries had no power or authority to require the insured to make payment.

b. The insurance company by the contract dealt solely with the insured, and was required to give notice to him alone. If the insured failed or refused to make a payment

at the due dates, or for thirty days after notice had been served, the contract was terminated.

c. The inability of the insured to pay, his refusal or his neglect to pay, operated to terminate the contract.

It is wholly immaterial who the beneficiary may be, whether third person not wife or children, or wife or children, so far as the question of notice is concerned. We are dealing only with the question of statutory notice to the insured. The wife or children, beneficiaries, cannot recover when the premiums have not been paid. It is not a question of the company preventing them from paying or preventing any one in their behalf from paying. The company, under the statute, owed no obligation to *them*. The obligation, if any, was to Cohen and to Hill alone. Such obligation, if any, was destroyed, the company claims, by the acts of the insured. If so, it follows that Cohen and Hill were without excuse for non-performance, and their non-performance had its full effect, namely, cancellation of the policies.

The sole excuse the wife of Cohen or the children of Hill urge for non-payment of premiums is that notice was not served on Cohen or Hill; but this failure to serve notice did not in any way prevent the wife or the children from paying or causing the premiums to be paid. In the case of Wheeler *vs.* The Connecticut Mutual Life Insurance Company, 82 N. Y. Appeals, 543, the policies had been assigned by Vose to his children, for whom he was general guardian. Vose became insane. This was held not to relieve the children.

"Although Vose was their guardian, if incapacitated by "his insanity, a competent person could have been ap- "pointed in his place; and hence his insanity was not "necessarily an insuperable obstacle to their performance "of the condition of the policy, and they were not relieved "thereby" (p. 550).

We submit, the insured stands as principal and is the only person with whom the insurance company had to deal; but if it should be contended that the beneficiaries are the principals and the insured their agent in matters relating to premiums, then the insured's relation to the matter is that of a general agent clothed with full power; and whether the beneficiary is a person of capacity or laboring under incapacity, in claiming the benefits of the policy he must be bound by the conduct and representations of his general agent. If the insured, as general agent, made such representations and was guilty of such conduct as would prelude him from recovering on the expiration of a term policy payable to himself, his beneficiary, whether over or under age, cannot recover upon like policy, for such representations and conduct will bind him also, and this, we think, in the nature of things, must be the universal rule, regardless of the capacity or incapacity of the principal. If a guardian or other person represents the infant beneficiary in asserting a claim to the insurance under such circumstances, he steps in the shoes of the insured.

In Klein *vs.* Insurance Company, 104 U. S., 88, a policy of insurance was issued upon the life of one Frederick W. Klein, payable to his wife, Clara Klein. One of the conditions of the policy was that if the stipulated premium should not be paid on or before a certain day the policy should cease and determine. A semi-annual premium due in March, 1871, was not paid. The wife alleged as a ground of relief that the policy was taken out by Frederick W. Klein without her knowledge; that she had received no information of its terms or conditions until after his death; that about February 1 he was taken down by the illness from which he died, and that on account of his condition he was incapable of attending to any matters of business whatever, and for that reason failed to pay the premium when it was due. The bill was dismissed in the lower court, and on appeal this court affirmed the decree.

Mr. Justice Woods, in the opinion (page 92), states:

"She (the wife) was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect of this contract of insurance, was her agent, in not informing her about the insurance on his life and the term of the policy. The bill is therefore an effort by her to obtain relief in equity against the appellee from the consequence of neglect of her own agent."

Knickerbocker Life Insurance Co. *vs.* Pendleton and others, 112 U. S., 696, was a case where a policy of insurance was issued on the life of one Samuel H. Pendleton for the benefit of the plaintiffs as the children of the said Samuel H. Pendleton. The policy was conditioned to be void if the annual premium, or any obligation given in payment thereof, should not be paid at maturity. The annual premium due in July, 1871, was paid by a foreign bill drawn by the insured, with the condition that the policy should be void if the draft was not paid at maturity. The bill was presented and not accepted on account of want of funds in the hands of the drawee.

In the opinion, at page 708, Mr. Justice Bradley says:

"The drawer (Pendleton) who took entire charge of the policy for his children, put its existence on the condition of the payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid, that the requisite funds were in the hands of the drawee, or that they would pay it, whether in funds or not."

In Miles *vs.* Connecticut Life Ins. Co., 147 U. S., 177, the insurance company issued a policy for $5,000 upon the life of John S. Miles for the sole use and benefit of Sarah G. Miles, his wife. It was at the instance of the insured that the policy was issued, and he paid with his own money all of

the premiums. Before the tenth premium became due the insured advised the company that he could not pay that premium and wished a paid-up policy. The company advised him not to do so, but to have so much of the $5,000 released as would enable him, with the sum allowed for such release, to pay what would be due as a premium on the remainder. This was agreed to, and a receipt was presented by him, signed by his wife, for $82.39, as a consideration for the release of $700 of the $5,000, the $82.39 being applied towards a premium on the $4,300. Thereupon the husband received a policy for $4,300 on his own life for his wife's benefit. Subsequently he took a paid-up policy for $1,195 in the same favor, having given what purported to be a receipt signed by the wife. It appears that the wife's name on both receipts was signed by the husband without her assent. In suit on the $5,000 policy brought by the wife, the company set up non-payment of premium.

The court held that it was a good defense, and that there was nothing to justify the failure to pay the premium.

In Schneider *vs.* U. S. Life Insurance Co., 123 N. Y., 109, the court held that a married woman in whose favor a policy of insurance was issued upon the life of her husband could not claim the benefit of the insurance without at the same time assuming all the responsibility of a failure to perform its essential conditions, among them being the payment of premiums.

In the opinion of O'Brien, J., at page 114, it is stated:

"The husband had the possession of the policy, and in dealing with the defendant in regard to it was treated as plaintiff's agent, and the rule that when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed, applies to this case."

See also Manhattan Life Ins. Co. *vs.* Smith, 44 Ohio State, 156.

In Baker *vs.* The Union Mutual Life Ins. Co., 43 N. Y. Appeals, 283, the court says:

"The case will not be changed if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and claiming the benefit of his acts and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent and makes them her own (Elwell *vs.* Chamberlain, 31 N. Y., 611: Bennett *vs.* Judson, 21 *id.*, 238). If the agent exceeds or transgresses his authority, the principal may repudiate his acts altogether, but cannot affirm in part and repudiate in part, take the benefit of the favorable parts of a contract and reject the residue."

In Whitehead *et al. vs.* New York Life Ins. Co, 102 N.Y., 143, a husband procured a policy of life insurance upon his own life for the benefit of his wife, or, in case of her death before his, of their children. *Held*, that the husband had no authority without the assent of the assured to surrender the policy, such an act not being within the scope of the agency inferable from the taking out of the policy by him; but where such a policy by its terms has become forfeited for failure to pay premiums, the husband may thereafter, in consideration of a sum paid, surrender it. In such case the forfeiture is not waived by the surrender, and the assured could not repudiate the surrender and at the same time assert the revival of the policy under it.

Finch, J. (p. 150):

"He (the insured), therefore, in procuring the policies to be made, in paying the premiums, in receiving and acting upon notices and in doing whatever was necessary to perfect and continue the rights of the assured, must stand in the attitude of an agent, acting and representing the assured, and as having no interest in the policies, unless, possibly, after the death of all of the assured."

Holmes *vs.* Gilman, 138 N. Y., 369, 381, 382, is to like effect.

In Mechem on Agency, section 775, the author states the rule as follows:

"Hence it is a rule of universal application, whether the principal be disclosed or not at the time of entering into the contract, that the principal is affected by, and is subject to, every defense which the other party may have, based upon such fraud, imposition, misrepresentation, concealment or other misconduct of the agent as is, either by a prior authorization or a subsequent ratification, properly chargeable to the principal as having been done or committed by the agent within the scope of his authority, although the principal himself may have been entirely innocent."

POINT II.

The answers in all of these cases set up facts which estop the insured and all others interested from recovering upon the policies.

Each of these answers sets up acts on the part of the insured indicating an intention to abandon the policy of insurance, with the practical result of rescission. Each of these answers sets up statements on the part of the insured by which he refused to pay the premiums, and also the fact that subsequent to such refusal the insured did not pay the premiums for a number of years prior to his death. It is obvious that with respect to any one of the annual premiums remaining unpaid the insurance company might have sent the notice provided for in the statute and forever have put an end to the possibility of a claim that the policy was a subsisting contract. Not sending these notices was conduct prejudicial to the interests of the insurance company, which consists of living members or policy-holders who faithfully perform their part and duly

and punctually pay their premiums. Refraining from sending the notices was, as is pleaded in all of these cases, induced by the conduct and acts of the insured, and, as is also pleaded, the company in not sending the notices relied upon the conduct of the insured in refusing to pay his premiums and in not paying his premiums. Whether the facts be looked upon as creating an agreement to abandon or rescind for a sufficient consideration, to wit, the detriment to the company, or as creating an estoppel, a defense is equally well made out by the company in each of these cases.

The policies in the Cohen and Hill cases not being payable solely to the insured, but also to wife or children, are nevertheless to be successfully defended against on the ground of estoppel.

In the Cohen case the widow sues because, although it is an endowment policy payable to Cohen himself in 1905, it became payable to his widow upon his death occurring prior to that date. No added difficulty arises from the fact that these two policies are payable to other persons than the insured as beneficiaries. It is well settled, as shown in Point I, that in all matters connected with the making of the application and the taking out of a policy the insured acts as the agent of the beneficiary, who is bound by the statements and the conduct of the insured. Similarly, for all matters connected with the payment of the premium and the receipt of any notice with respect thereto, the insured must be considered the general agent of the beneficiary. The insured is the person who determines how and when the premium is payable and who is expected to pay the premium and who actually does pay the premium. The scheme of the contract makes no provision for payment of the premium by anybody but the insured. The statutes with regard to the sending of premium notices relate primarily to the sending of notices to the insured—not to the beneficiary.

It has been held that the insured is under no duty to the beneficiary to pay the premiums and keep them up. Remembering that the statute contains no provision for sending notice to the beneficiary and confers no right of forfeiture upon the company if the notice be sent to the beneficiary, it seems clear that in all matters connected with that notice the insured must be regarded as the representative and agent of the beneficiary. The statute is designed not to jog the memory of the beneficiary, not to guard against the negligence or want of business promptness and attention of the beneficiary, but to deal in these matters simply with the insured. When the insured, as in these cases, refuses to pay a premium, elects and makes known his election to the company to have the policy lapse and forfeited, and subsequently for many years does not pay any premiums, the company is lulled into security and the belief that the insured has abandoned the policy, and that the sending of notices is unnecessary and would merely call attention to an act which the insured had long since determined he would not perform.

POINT III.

The time limited in the premium-notice statutes for sending the prescribed notices clearly indicates that such notices were required to be sent only to persons having addresses within the boundaries of the State of New York.

The necessary limitation of the scope and effect of the premium-notice laws to the geographical boundaries of the State of New York is shown by the circumstance that the length of time provided in these statutes for the giving of notice to the insured precludes the possibility that the legislature could have contemplated that these notices would be

sent to others than those who were to receive their mail-matter within the limits of the State of New York. All of these statutes make such provision with regard to the mailing of the notice that the insured will always suffer forfeiture of his policy at least at the end of thirty days from the date of the mailing of the notice. Thirty days is the obligatory limit of statutory forewarning. In view of the circumstance that long prior to 1876 insurance companies of the State of New York had been transacting business not merely in the most remote portions of the United States, but also in foreign countries, it is obvious that there would be many insured in these companies whose distance from the home office would be such that it would be physically impossible for a notice to be mailed and received by them in time for the insured to make remittance of the premium and save a forfeiture. It must be considered that the legislature had this information in its possession when the acts were passed. The logical conclusion is that the legislature could not have intended to require that the notice be sent to those who had post-office addresses outside of the State of New York, because in many instances the sending of such notices would be productive of no useful or practical result. The declaratory act of 1897, expressly limiting the mailing of notices to those having post office addresses within the State of New York, proves that this view is the correct view, and the argument on page 17 of the Cohen brief on this point is thus rendered conclusive.

It was not intended that the statutory notice should be mailed to persons outside the State of New York. The statute is one of public policy, external to the contract. By agreement of the parties it cannot be drawn into the contract nor excluded from it. It presupposes a contract between the parties such as they see fit to make. It in no manner limits their contracting rights. It is not a statute of contract or a contract obligation. It comes by way of relief, after a contract has been made and after it has been

violated, to afford protection, in the interest of the public, to a certain class of persons against the consequences resulting from such violation of contract, or rather, as a matter of public policy, it prevents one of the parties to the contract from making defense of the violation of the contract by the other party. It shuts the doors of the courts of New York against the insurance company in making defense of non-payment of premium according to the stipulation of the contract. The original statute, being enacted in 1876 with the object of protecting insured persons against their own negligence and improvidence, provided a time of notice that must have been deemed adequate to accomplish the purpose the legislature had in mind, which was to remind the neglectful policy-holder of the due date of his premium, and after bringing him information upon the subject, of also affording him the opportunity of making payment at the home office of the company in the State of New York. Such a notice, if confined to the State of New York, would accomplish the purpose the legislature had in mind. If at the time of enactment of the law it extended indefinitely beyond that State, it was of little or no value to the policy-holder. The construction of this public-policy statute for which we contend is, that the notice was to be mailed to persons in the State of New York. If this is not the correct construction, then the legislature intended to reach out, with a thirty-days' notice, to the limit of mail communication, whether upon this continent or wheresoever treaty arrangements extended the mail facilities of the United States. The fact that the affidavit of an agent or employé of the insurance company is by the statute made *prima facie* evidence of the mailing of the notice furnishes another strong reason for the contention that the notice applied only within the State. Such rule of evidence could not be established for courts of other States and jurisdictions.

POINT IV.

All questions arising under the act of 1897 are open to discussion in this court.

The case arose in the court of first instance upon a general demurrer. Notwithstanding that neither the complaint nor the answer referred to any of the premium-notice acts, the United States court was competent to take judicial notice of these public statutes. Every question arising, therefore, on any of the premium-notice statutes was open to discussion in the court below, assuming that the omission from the pleadings did not result in leaving the original plaintiff with the cause of action defectively pleaded. On the appeal to the circuit court of appeals and in this court the only assignment of errors necessary was a general statement that the court erred in giving judgment for the original plaintiff upon the demurrer to the answer. The records of such cases as these necessarily fail to show, and it is not necessary that they should show, what questions were *discussed* in the court of first instance or at the circuit court of appeals. Where a cause is presented upon a general demurrer, the record cannot show what questions were *discussed*, and it therefore must be assumed that every question that could have been discussed was taken up, and no such question can be excluded from the consideration of any court at any stage of the case. The defendants in error cannot prove to this court, either by assertions of counsel, or by briefs of opposing counsel filed in the court below, or by the opinions of the court, what the questions were that were discussed or omitted in either of the lower courts. This court has repeatedly held that the record, and that alone, can be appealed to for such purposes, and that briefs of counsel and opinions of the courts form no part of the record. Counsel are not prohibited from discussing

orally propositions that are not set forth in their briefs, nor are courts presumed to be uninfluenced in their decisions by questions proper in the case which may not be taken up for discussion in the prevailing opinion.

The rule that requires the court to take judicial notice of the statutes of New York of 1877 and 1892 equally applies to that of 1897. Counsel cannot preclude this tribunal from applying a general statute of which it must take judicial notice to the case under review.

POINT V.

The legislature of the State of New York, with respect to existing policies, had power under the act of 1897 to withdraw the provision with respect to notice, to fix a period of time after which, with or without notice, the company could declare a forfeiture, and to provide that action should not be brought within a year from a default in the payment of premiums.

A.

The original act of 1876 was held to affect prior existing policies. This was never questioned by counsel or by the courts, notwithstanding it placed upon the companies an obstruction to the exercise of their contract right to forfeit existing policies for non-payment of premiums upon the due date.

B.

The provisions of the contracts affected and of the premium-notice statutes establish the proposition that these laws are a governmental regulation and do not form part of the contract, so as to confer any vested right upon the

holder of a policy made subsequent to the enactment of any of them; nor does the act of 1897 impair the obligation of any contract of the holder of a prior existing policy. None of these statutes prescribes the form of the contract or prohibits the agreement which is entered upon by all of these policies in question by which, upon failure to pay the premium upon the due date, the policy-holder forfeits, first, any accumulated reserve; and, second, his right to continuing or future insurance. The statutes (of 1876, 1877, and 1892) merely operate upon the parties after the contract has been executed and delivered, and regulate the form or method of procedure of the company in carrying out its rights under the contract. It never has been pretended that the effect of any of these statutes is to absolve the policy-holder from the payment of premiums; and, indeed, in no just sense can it be said that, even with the protection of the statute, the policy-holder is otherwise than in default under his contract when he fails to pay his premium upon the day fixed. The scope, object, and effect of the statute is, merely as a governmental regulation and as a matter of public policy, to interpose an obstacle in the way of the company insisting upon its rights of forfeiture given by the terms of the contract until it shall have given the prescribed notice. This notice is additional to that which the policy-holder already has through the possession of his policy, whose terms prescribe the amount of premium due, the day upon which it falls due, and the place where it may be paid. This second and additional notice prescribed by the statute is secured to the policy-holder only by the statute, and there is no rule of common law which renders it necessary that the statutory notice or any similar notice should be given him before his contract with regard to forfeiture takes full force and effect. We have no case here like that of requiring process to be served before judgment can be taken in an action at law. This is not a question of due process of law. There is no necessity that the legislature should provide for the statutory

premium notice or any similar notice. It is a work of supererogation, an additional safeguard from motives of public policy thrown around the interests of the policy-holder, which in no sense becomes part of his contract, so that the legislature cannot subsequently to the making of the contract withdraw the provision for giving notice. In none of these cases have the parties imported the statute into the policy. The form of the contract evinces the intention of the parties to disregard the statute, to contract in spite of it, and to provide that the policy shall be forfeited if the premium be not paid upon the due date. The provision in the policy waiving any statutory notice of the due date of the premium, or any notice other than that contained in the policy itself, shows the intention of the parties to get away from the statutes as much as possible, and precludes any claim on the part of the policy-holder that he is not satisfied with a repeal of the statute as to his existing policy. Nor is this view changed by any language contained in the policy or application that they are subject to the laws of the State of New York and are to be construed by such laws. Of course, the policy must necessarily be subject to the laws of the State of New York, if it is a New York policy, and the statement in the application that it is so subject is nothing more than an expression of a legal fact and not of an intention on the part of the parties to make a contract in the terms of the statute. The premium-notice statutes are purely remedial. They are passed by the State in the exercise of its police power and of its right to protect the negligent, careless, and unbusinesslike from the disastrous effects of their unreasoning conduct. Such statutes have always been held to be repealable and to confer no vested right. They are passed from motives of public policy, with no regard for individual interests or the rights of any particular person, and are not considered as conferring rights upon any individual. The repeal of premium-notice statutes rests upon

the same basis as the repeal of any other law which has obstructed the carrying out of a contract morally valid but legally invalid. Such repealing statutes are not considered as impairing the obligation of a contract, but as removing an obstruction to the performance of a contract. The premium-notice statutes never touch the obligation of the contracts, but simply deal with the mode and method by which the company may proceed to forfeit the contract according to its terms. The only effect, therefore, that an amendment or repeal of a premium-notice statute has, is to leave the contract operative in a particular with respect to which it was formerly obstructed. These views have been accepted by the circuit court of the United States for the sixth district, both in the first instance and in the court of appeals, in the case of Rosenplanter *vs.* Provident Life and Savings Assurance Society of New York. Copies of the opinions of the court are annexed to our brief in the Cohen case. In the circuit court of the United States for the ninth district the general proposition with regard to the power of the legislature in this behalf is accepted in the case of Hathaway *vs.* The Mutual Life Insurance Company, a copy of which opinion is annexed to our brief in the Cohen case; but the Rosenplanter case is distinguished, as we think, fallaciously, as has been pointed out in our Cohen brief. The supreme court of the State of New York and the superior court of the State of California have also upheld the power of the legislature as here claimed.

It is well settled that the legislature can withdraw the defense of usury with respect to existing contracts. Retroactive effect is given to laws prohibiting the defense of usury, as such statutes are regarded rather as laws giving force and validity to the obligation of contracts than as impairing such obligation.

Wade on Retroactive Laws, secs. 240, 244, 245, and 246, and cases there cited.

It has been held that an act validating bank notes previously invalid was constitutional and impaired no vested right.

Bleakney *vs.* Farmers' and Mechanics' Bank, 17 Sergeant & Rawle, 64.

Hayes *vs.* Wurts, 4 Sergeant & Rawle, 356.

Trustees Cuyahoga Falls R'y Co. *vs.* McCaughney, 2 Ohio St., 52.

A remedial act permitting an unpaid tax to be paid so as to validate a void contract has been held to be valid.

Phœnix Ins. Co. *vs.* Pollard, 63 Mis., 641.

Remedial acts permitting stamping of unstamped instruments are valid.

Harris *vs.* Rutledge, 19 Ia., 388.

In this case the obligor in a contract claimed a vested right to avail himself of his own default in complying with the law requiring him to affix his stamp to the instrument executed by him. This seems a proposition only less shocking than those involved in these cases—that an insured after neglecting to comply with his contract for years can nevertheless, by reason of a technical omission to send an unnecessary and useless notice, mulct the company. The contract of insurance cannot be read over without a recognition of the moral obligation on the part of the insured not to claim anything under the policy unless he has punctually paid his premiums. That moral obligation renders it impossible that he should have any vested right in even a statutory regulation interposed from motives of public policy as an obstruction to the performance of his obligation. There was no moral wrong in the insured entering into the contracts in question; contrariwise, they were morally valid, and could be enforced according to their terms but for the obstructive effect of the

necessity of giving this notice. The insured certainly has no vested right in not performing his contract according to its terms, which, be it observed, was never declared by any statute to be invalid or in any sense prohibited by law. The giving of the notice provided for in these statutes is a mere remedy, and does not cease to be such because it is obstructive to the company and beneficial to the policy-holder. Remedies of necessity belong to the supreme power to prescribe, and their continuance is not the subject of contract between private parties.

Conkey *vs.* Hart, 14 N. Y., 30.
Curtis *vs.* Whitney, 13 Wall., 68.
Cooley on Const. Lim., 2d ed., 361, 362.

There is no good reason why legal impediments to the enforcement of contracts binding upon the conscience may not be removed.

New Orleans *vs.* Clarke, 95 U. S., 644.

That the provision in the policy that it be forfeited if the premiums be not paid upon the due dates is binding upon the conscience of the insured and is a moral obligation is made clear from a consideration of the character of a life-insurance policy. It is a wagering contract. The insurance company bets that the insured will die after the average age, and can make no money out of the transaction unless the insured so dies. The insured bets that he will live less than the average age, and gains nothing unless he so lives. Those who die under the average age are paid their losses by the gains from those who live beyond the average age, who, by their overpayments, produce the funds to pay the losses of those dying early. The scheme of life insurance is therefore totally deranged by a cessation of payment of premiums by an insured for a number of years, with a subsequent restoration of the policy, for the reason that, as the contract is unilateral and the insured cannot be com-

pelled to pay premiums, the matter takes this practical turn: That if the insured has an impaired life and sees that he will die under the average age he will pay up his premiums and have his policy restored; whereas, if he sees that he will live beyond the average age he will not pay up back premiums. This whole matter is most ably elucidated in the case of Statham *vs.* N. Y. Life Insurance Company, 93 U. S., 24. (See point IV, Phinney brief, p. 94.)

POINT VI.

The intention of the legislature in passing the statute of 1897 was to affect existing policies.

Existing policies were embraced in the word "hereafter," where the statute refers to policies "hereafter issued or renewed." This was a perpetuation of the former language and speaks as of the time of the passage of the act of 1876. The word "renewed" in this section in the act of 1899 means precisely what it was held to mean in the original act of 1876. It means an existing policy which is renewable or to be renewed or capable of being renewed by the payment of a premium after the first premium. It must be observed that this act of 1897 is in no sense limited to residents of the State of New York. It affects all policies and holds out to every policy-holder the opportunity of obtaining the benefits of its provisions, provided he has a post-office address within the State of New York. Non-residents, as well as residents, may have such an address. It is obvious that the statute of 1897 effects these results:

(1.) It absolutely repeals all provision as to notice to those who do not have post-office addresses in the State of New York, and as to them it gives power to the company to forfeit the policy within a year from any default when there has been no notice.

(2.) With regard to existing policies where a default has occurred prior to the taking effect of the act of 1897, it gives power to forfeit the policy at the expiration of a year from non-payment of premium, even if no notice has been sent.

(3.) As to policy-holders not having post-office addresses within the State, the company being under no necessity of sending them any notice, and upon showing the proof of notice to those having such addresses, it clearly has the right to forfeit the policy upon any default occurring after the taking effect of the act.

(4.) In any event and with respect to any policy it limits all right of action upon the policy to a year after any default in paying premium.

The Cohen and the Sears policies are clearly forfeited, because in each case the premium for the year preceding the act of 1897 was not paid and more than a year elapsed after such premium became due before the death of the insured. A premium became due after the act of 1897 took effect and was not paid, and no suit was brought upon the policy, either to restore it or to recover upon it, within a year from the non-payment of the premium that fell due after the act of 1897. It is not necessary to repeat here the arguments contained in the fourth point of the Cohen brief, but attention is respectfully requested to them in this connection. If our argument is well founded that the provision about bringing suits within a year is not a statute of limitation strictly, but a limitation upon the right granted by the statute to every policy-holder, then it was not necessary to plead the statute.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. ____.

MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

BESSIE SEARS, DEFENDANT IN ERROR.

We have fully covered our objection to the court granting the writ of certiorari in this case in the brief filed resisting a like application, to which we respectfully refer the court and ask the court to consider that brief as the brief in this case. The facts, so far as the matter before the court, are practically identical with this, but there is one feature of the case which we mentioned in the Hill brief that we desire to again call the court's attention to. Mr. Sears paid two and one-half years' premium of $491 each *on ten-pay* life policy—that is to say, he paid one-fourth of the amount necessary to buy a policy of ten thousand dollars payable at his death or he fully paid for a $2,500 policy payable if by the terms of the policy he could have used the reserve for such purpose.

By the statute of New York relative to the reserve and by the terms of the policy, if he had paid another semi-annual premium of $246 he would have been entitled to a paid-up

policy of $3,000 or a policy of extended insurance for nine years. If the insurance company had served the statutory notice, then Mr. Sears would have been compelled to pay this additional sum or forfeit the right to this $10,000 insurance, and also the right to the paid-up policy of $3,000 or the $10,000 extended insurance. The payment of this $246 would have carried the full policy six months longer, at end of which time he could elect to keep it in force or let it lapse, and, in case he chose the latter, would have six months longer in which to surrender his policy and take the new fully paid-up policy for $3,000 or the policy of extended insurance for the full $10,000, running nine years longer, all fully paid for. In other words, the payment of $246 would have carried the original policy of $10,000 for six months, at which time, if the statutory notice was served, he would have to elect whether to pay the premium and keep the policy in force or let it lapse, and then, under the statute, have six months longer to elect which he would take, a paid-up policy of $3,000 or a policy of extended insurance of $10,000 for a term of over nine years, or five years beyond his death. Now, these were most valuable rights. This $246, which would have secured these most valuable rights, could have been borrowed from any reputable insurance company or from any party who had money to loan, with the policy alone as security. But Mr. Sears did not need to pay this premium or borrow the money to pay the premium or make any election of his rights, because he was never put in default. If the company had served the notice, then Mr. Sears would have had to make his election promptly and in strict and technical compliance with his contract and the statute. Neither the courts nor the company would have allowed him any departure therefrom. The courts are full of cases under the New York statutes where the insured has carried his policy beyond the three years required by the statute and then permitted his policy to lapse, and

failed, through ignorance of his rights or otherwise, to technically surrender his policy within the limited six months, and therefore too late to get either a policy of paid-up or extended insurance, though fully paid for. The courts have uniformly strictly enforced the time limit.

The company does not pretend to say it complied with the contract and statute in terminating and depriving Mr. Sears of these valuable rights. In fact, it admits it entirely ignored the statute. It does not claim that Mr. Sears ever received consideration for the alleged surrender of such valuable rights. As we have shown in the Hill brief, it does not allege any facts showing an estoppel, even if such defense was open to it. It does not pretend to say it was ignorant of its rights or duties; that it was misled by Mr. Sears' conduct; that it did anything or left anything undone by reason of such conduct. It is not claimed that it refrained from sending the notice on account of his conduct, but, on the contrary, without sending any notice immediately entered the policy on its books as a forfeited contract, and in all the alleged conversations with him thereafter treated it as a forfeited contract. As we have shown in the Hill brief, these defenses must fail, as it was the intent and purpose of the statute to entirely eliminate any such defense. We have shown that the statute could not be waived, directly or indirectly.

To protect the insured in his valuable rights above suggested was the very purpose of the statute, and the insured cannot be deprived of them except by a strict compliance therewith.

The New York court of appeals says:

"The purpose of the statute referred to was to establish a rule to preserve to the assured the benefits of premiums paid, and to prevent the lapse of policies without ample notice. * * *

"We are also of the opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of

No. 452.
Brf. of Warburton for D. C.

Office Supreme Court U. S.
FILED
MAR 14 1900
JAMES H. McKENNEY,
Clerk

Filed Mar. 14, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 452.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

BESSIE F. SEARS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF STEPHEN P. SEARS, DECEASED, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-13-1900

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BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

In May, 1891, Stephen P. Sears, a resident of the city of Tacoma, in the State of Washington, made application there to a solicitor of the plaintiff in error for the policy of life insurance which is involved in this litigation. The application was in writing and contained a provision that it was made subject to charter of the company and the laws of the State of New York. It was sent by the agent to the home office of the company in New York city. The company there

accepted it, there executed the policy, and forwarded it to the Tacoma agent for delivery to Sears upon payment of the premium for the first year. Upon its arrival at Tacoma, Sears paid the premium to the agent, and received the policy from him. When transmitted from New York the policy bore the company's acknowledgment of the payment of the first premium. Among the provisions of the policy (Record, p. 5) are the following:

The application is a part of the policy.

The policy is payable at the home office of the company in New York.

The loss is payable upon acceptance by the company at his said home office of satisfactory proof of death.

All premiums after the first are payable at said home office, but will be accepted elsewhere when paid in exchange for the company's receipt signed by its president and secretary.

Notice of each succeeding due date is given and accepted by the delivery and acceptance of the policy, "and any further notice required by any statute is thereby expressly waived."

"That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim.

"In witness whereof the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary *at its office in the city of New York.*"

Sears paid the next premium (May, 1892), but did not pay any subsequent premium. He died in Tacoma on March 30, 1898. The defendant in error (the executrix of his will) brought this action upon the policy in the United States circuit court for the district of Washington, western (Tacoma) division. The defendant answered, setting up two affirmative defenses:

1st. The facts aforesaid in regard to the method of issuance and delivery of the policy and the non-payment of the 1893, 1894, 1895, 1896, and 1897 premiums.

2d. The same facts as in the first defense, with an added paragraph (VI), setting up certain alleged facts which occurred between Sears and itself after May 18, 1893, and before his death, as the basis of an estoppel *in pais*. A general demurrer was interposed to each of these affirmative defenses, and one to the answer as a whole. The demurrers were sustained, and, the company electing to stand upon its answer and not plead further, judgment was entered against it for $7,470.46. This amount was arrived at by deducting the amount of the passed premium, with interest from the due date of each, from the face of the policy ($10,000). The company prosecuted a writ of error from the circuit court of appeals, which resulted in an affirmance of the judgment. This court having issued its writ of certiorari to review that judgment of the circuit court of appeals, the case is now here as upon writ of error to that court.

The circuit court and the circuit court of appeals, following the decisions of the court of appeals of the State of New York and the current of authority, ruled that—

The case and policy is controlled by the anti-forfeiture statute of New York.

The attempted waiver thereof in the policy was ineffectual.

The plea of estoppel is insufficient.

ARGUMENT.

I.

The New York Statute Applies to and Controls the Policy.

There are three reasons which support this proposition. They will be discussed under subheads 1, 2, and 3, following:

1.

THE CONTRACT TOOK EFFECT (WAS MADE) AND WAS WHOLLY TO BE PERFORMED IN THE STATE OF NEW YORK.

The foregoing statement of the case shows clearly that every act of either contracting party relating to *performance* of the contract is required to be done in the State of New York. It is, however, true that the first premium was paid at Tacoma. The policy permitted it and the company accepted it. It is also true that the policy permitted the company to yield the requirement of payment in New York of any subsequent premium if it chose to send out in advance its official receipt therefor.

The application was accepted in New York and the policy there issued and mailed for delivery at Tacoma, but as so issued it was complete and bore the company's acknowledgment of payment of first premium. So that the contract became complete there. In this connection there is a distinction to be noted between the case at bar and the Phinney case. In the latter case it appeared from the record that the application contained a provision that the policy "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health," a fact which does *not* appear in the record in the case at bar.

The place of performance being the State of New York (even though partial execution took place in Washington), the contract is governed by the New York statute.

This is the law as established by numerous decisions of this court. It is so announced by Mr. Justice Harlan:

"The contract, therefore, was one which in all its parts was to be performed in England. Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate of seven per cent., fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed. For, as said by Chief Justice Marshall in Wayman *vs.* Southard, 10 Wheat., 1, on p. 48, it is a principle, universally recognized, that 'in every forum a contract is governed by the law with a view to which it was made.' And by Lord Mansfield in Robinson *vs.* Bland, 2 Burrow, 1077, 1078, 'The parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. Now here the payment is to be in England; it is an English security, and so intended by the parties.'

"Referring to these and many other cases, this court, speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard *vs.* Norton, 106 U. S., 124, 136, that the law upon which the nature, interpretation and validity of a contract depended, was that which the parties, either expressly or presumptively, incorporated into it as constituting its obligations." Coghlan *vs.* South Carolina R. R. Co., 142 U. S., 101–109.

In another case the Supreme Court of the United States was called upon to pass upon the above question of law on a state of facts almost identical with the facts of this case. Mr. and Mrs. Hume were living in the city of Washington, District of Columbia, when they made application to the

Connecticut Insurance Company of Hartford, Connecticut, for a policy of insurance, and the question came squarely before the court whether the laws of Connecticut or the laws of the District of Columbia should prevail in governing the rights between Mrs. Hume, the beneficiary, and the creditors of the deceased husband. The court finds the following facts:

"On the 13th day of June, 1881, the Connecticut Mutual Life Insurance Company of Hartford, in consideration of an annual premium of $350.30, issued a policy of insurance upon the life of Thomas L. Hume, in the sum of ten thousand dollars ($10,000) for the term of his natural life, payable at Hartford, Connecticut, to Annie G. Hume and her children by him or their legal representatives. The application for this policy was signed 'Annie G. Hume by Thomas L. Hume.' It was expressly provided as a part of the contract that the policy was issued and delivered at Hartford, in the State of Connecticut, and was 'to be in all respects construed and determined in accordance with the laws of that State.'"

In another part of the statement it appears that Mr. Hume lived in Washington, D. C., and died at that place October 23, 1881.

Upon the above state of facts the United States court, in an opinion written by Chief Justice Fuller, states the law as follows:

"Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts, the statute of the State where they were made and to be performed, explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children, but if the annual premium exceed three hundred dollars (300.00) the amount of such excess shall inure to the benefit of the creditors of the person paying the premium.

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of per-

formance, and the stipulation of the parties was made with reference to the laws of that place.

"And if this be so as between Hume and the Connecticut companies, then he could not have, at any time, disposed of these policies without the consent of the beneficiary nor is there anything to the contrary in the statutes or general public policy of the District of Columbia."

Washington Central Bank *vs.* Hume, 128 U. S., 195, on pages 197 and 206.

A recent decision of the United States Supreme Court (London Assurance *vs.* Companhia de Moagens Do Barreiro, 167 U. S., 149) is to the same effect. In that case there was not so much in the contract to show the intent of the parties as to the place of the contract as there is in the case at bar. The following quotation from the decision last cited will suffice to show its pertinency:

"Under the circumstances we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia by its agents, and that contract, by its terms, was to be performed in England. The parties to it understood and agreed that, in case of loss or damage to the interest insured under the certificate the same was to be reported to the corporation in London, and to be paid in sterling at its office in the Royal exchange in the city of London, and the claims were to be adjusted according to the Lloyds, but subject to the conditions of the policy and the contract of insurance. Generally speaking the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has *agreed* to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own."

In the Baxter case, 119 N. Y., 450 (commented upon more fully *infra*), the policy was upon the life of one Matteson, a

resident of Pennsylvania. (See Appendix.) The policy provided:

"This policy is a contract made and to be executed in the State of New York and shall be construed only according to the laws of that State."

In passing upon the question of the applicability to the policy of the anti-forfeiture statute of New York the court of appeals said:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877. This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way, and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

The circuit court of appeals for the sixth circuit, in a very recent case, in an opinion by Judge Taft, says:

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that 'the place of contract shall be the city of Philadelphia, State of Pennsylvania.' In Weyman *vs.* Southard, 10 Wheat., 1–48, Chief Justice Marshall stated it to be a principle of universal law that 'in every form a contract is governed by the law with a view to which it is made.' (See Pritchard *vs.* Norton, 106 U. S., 124, 136; 1 Sup. Ct., 102, and cases there cited.) In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. *vs.* Savings Bank, 72 Fed., 413; 19 C. C. A., 286.

Also—

Equitable Life Assurance Society *vs.* Nixon, 26 C. C. A., 620; 81 Fed., 796.
Equitable Life Assurance Society *vs.* Trimble, 27 C. C. A., 404; 83 Fed., 85.
Phinney *vs.* Insurance Co., 67 Fed., 493.
Griesemer *vs.* Mutual Life Ins. Co., 10 Wash., 202–212.
Hall *vs.* Cordell, 142 U. S., 116, at page 120.
Pritchard *vs.* Norton, 106 U. S., 124, at pages 136 and 137.
Steamship Co. *vs.* Phenix Insurance Co., 129 U. S., 397.
Hyde *vs.* Goodnow, 3 N. Y., 266–269.
Griffith *vs.* Insurance Co., 101 Cal., 627; 36 Pac., 113.
Goodwin *vs.* Insurance Co., 97 Ia., 226; 66 N. W., 157, at page 160.
Massachusetts Insurance Co. *vs.* Hale, 23 S. E., 849; 96 Ga., 802.
Mullen *vs.* Insurance Co., 89 Texas, 259; 34 S. W., 605.
Insurance Co. *vs.* Pollard, 94 Va., 146; 26 S. E., 422.
Richardson *vs.* Rowland, 40 Conn., 565.
Bennett *vs.* Eastern Building Ass'n, 177 Pa. St., 233; 35 Atl., 684.
Equitable Ins. Co. *vs.* Frommhold, 75 Ill. App., 43.

The cases relied upon by plaintiff in error against this contention of defendant in error do not so hold. The one chiefly relied upon is the case of Wall *vs.* The Equitable Life Insurance Company, 140 U. S., 226.

In the first place, there was no provision in the contract (either in the policy or application, which together make one contract) stipulating that the contract should be subject to the laws of New York.

In the second place, the Equitable Insurance Company, as a matter of comity, not of right, was permitted by the State of Missouri to come into that State and make contracts with the citizens of Missouri. Having been thus permitted to come into the State to make contracts with its citizens, it was

perfectly competent for the State of Missouri to impose such terms upon it and like companies as the State saw fit or exclude the foreign insurance companies altogether from their territory.

Bank *vs.* Earle, 13 Peters, 519.
Runyan *vs.* Coster, 14 Peters, 122, at page 129.
Hooper *vs.* State of California, 155 U. S., 648.

The legislature had passed an act regulating the forfeiture of life-insurance policies after the paying of two annual premiums, to the effect that the insured should have the benefit of his reserve by the way of extended insurance. This statute established the public policy of the State of Missouri relative to such contracts. By another provision of the law, it was made the duty of any foreign insurance company, if it accepted the privilege of doing business in that State, to make all its contracts in compliance therewith. The section last mentioned is in the following words:

"SECTION 5983. No policy of insurance on life, hereafter issued by any life insurance company authorized to do business in this State on or after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, become forfeited or void by reason of the non-payment of premium thereon, but it shall be subject to the following rules and commutations, to wit: * * * *"

The policy in the Clements case was issued after the first day of August 1879 as provided in the above section. It must be presumed the company was authorized to do business within the meaning of that section. If so, then it accepted the terms provided in the statute and was bound to make no contract of forfeiture in disregard of the statute. But this it did attempt to do, even though the contract was actually consummated in Missouri. This court held two things—first, that the contract was a Missouri contract, as it was there consummated; second, and more important than the above, it held that this statute could not be waived by

the parties. If the statute could not be expressly waived by the parties because of the provision of the statute above set forth (which is copied in the opinion of the court), then it must follow that it could not be done indirectly by making the place of contract outside of Missouri in order to avoid this statute. It would be a strange rule of law that would hold the parties could not waive a statute of Missouri and yet hold that it was competent for the parties to avoid the statute by making the place of contract elsewhere. It needs no authority to support this distinction. It suggests itself forcibly and distinctly. No other result could be reached logically.

This same doctrine with reference to this same Missouri statute is very forcibly set forth in a decision rendered by Judge Treat, in which Judge McCrary concurred.

Fletcher *vs.* Insurance Co., 13 Federal Reporter, 526.

In a subsequent case the above opinion was cited with approval by Mr. Justice Brewer, sitting as district judge.

Ball *vs.* Insurance Company, 32 Federal, at 273, at page 275.

In a subsequent case Judge Caldwell, sitting in the same circuit, concurred with Judges Treat, McCrary, and Brewer in the opinions above referred to.

Berry *vs.* Indemnity Company, 46 Federal, 139, page 141.

Each of the other cases heretofore relied upon can be distinguished in the same way. In each case there was an attempt to make the place of contract in a State other than the one in which the insured lived, in order to avoid the public policy or statute of the State where the contract was actually consummated. These cases for this reason are not in point. In none of the cases cited, except the one in the 54 Fed., 580, which was affirmed in the 58 Fed., 723, was

there a stipulation that the place of contract was other than the place where the contract was actually consummated. The circuit court of appeals, in affirming this decision of the 54 Fed., entirely ignores the point so strenuously insisted upon, but bases its decision on general laws entirely outside the applicability of the Iowa statute. One cannot read the two cases without at once being convinced that the circuit court of appeals did not consider the decision of the lower court sound on the question of the "place of contract." But if it had, it would not be in point, because the stipulation making it a New Jersey contract to avoid a statute establishing the public policy of the State of Iowa would have been void. We ask the court's careful attention to the decision of the circuit court of appeals in connection with the 54 Fed., believing as we do that there is nothing in it to support plaintiff in error's claim.

So considering the opinion of the Clements case wholly in connection with the facts in the case, it is very apparent that the true basis of the decision was that the assured, living in Missouri, and the insurance company doing business in Missouri must be subject to the public policy of the State of Missouri, and that it would not allow the parties to withdraw themselves from the beneficial effects of the public policy and the statute of Missouri by making the place of contract outside of the State of Missouri.

The distinction between the Clements case and the case at bar is taken by Judge Ross, of the ninth circuit, in Nixon *vs.* Equitable Life, 81 Fed., 796; 26 C. C. A., 620 (afterwards followed on facts like the case at bar in the Trimble case, 27 C. C. A., 401), as follows:

"When the application and the applicant's money were accepted by the society the contract between the parties became complete. This was done in the State of New York. Not only so, but, as has been seen, all the conditions of the

policy were to be performed in the State of New York; the premiums were to be paid in that State; proof of loss, if any, was to be there made, and the payment agreed to be made by the defendant corporation in the event of the death of the assured was to be made in the State of New York. *It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that State, subject, perhaps, to any additional limitations or conditions imposed by the statutes of the State (then Territory) into which the defendant corporation went to solicit the business in question, for it may be true that every foreign corporation that enters a State other than that of its creation, and there transacts business, does so in subordination to the statutes of the State permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contract, be removed from the operation of the statute of the State permitting the business to be transacted. But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question. * * * There is nothing to the contrary in the case of Society vs. Clements, 140 U. S., 226, so much relied on by the plaintiff.*"

2.

THE NEW YORK STATUTE IS A LIMITATION UPON THE POWER OF THE PLAINTIFF IN ERROR, A NEW YORK CORPORATION, ATTENDING IT WHEREVER IT TRAVELS.

If this proposition is sound, it establishes the applicability of the statute, regardless of the place of execution or performance of the contract.

The proposition is laid down by the supreme court of Maryland upon the following state of facts:

A Pennsylvania corporation received an application in Baltimore, delivered the policy there on receipt of the first premium in Baltimore, Maryland. The law of Pennsylvania above cited contains a further provision that "Whenever an application for a policy of life insurance contains a clause of warranty of the truth of the answer therein contained, no

misrepresentation or untrue statement in such application, made in good faith by the applicant, shall affect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application unless such misrepresentation or untrue statement relates to some matters material to the risk."

The company, regardless of this statute, made every answer in the application an absolute warranty, and were insisting on the breach of the warranties as a defense. They insisted that the law did not apply. The supreme court on this point used this language:

"But the statute of Pennsylvania, which was offered in evidence, enacts that in such cases no misrepresentation or untrue statement in the application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense unless it relates to some matter material to the risk. It is beyond question that the powers and capacities of a Pennsylvania corporation are conferred and regulated by the laws of that State. Without its authority it could not exist at all. Every contract it makes, every act it performs, every right it acquires, and every obligation it assumes must be by virture of the same authority. It may make contracts, transact business, sue and be sued, beyond the limit of the State of its origin. But all these transactions are by the permission of the State where they occur, and not by virtue of any right belonging to the corporation. Everywhere within and without the State which created it, its contracts are limited, construed, and sustained according to its charter and the laws which affect its operation. In McKine *vs.* Glen, 66 Md., 484, this court said: 'It is a familiar principle that a corporation and all who deal with it are bound by the laws of its creation, and all such laws as may be legitimately prescribed for its government by the sovereign authority from which it derives its corporate existence.'"

Insurance Co. *vs.* Ficklin *et al.*, 74 Myd., 172, on p. 180.

A like rule is laid down by the Supreme Court of the United States. In one case a Missouri insurance corporation became insolvent. It had both property and creditors

in Louisiana. The creditors went into court and had a local receiver appointed. By the Missouri statute, the insurance commissioner of that State was the party who took possession of the effects and wound up the affairs of such corporations. The question as to whether the Louisiana receiver, who was the first to get possession of the effects in that State, or the insurance commissioner of Missouri should have possession of the property in Louisiana, the court was called upon to decide, and in its decision used the following language:

"Relfe is not an officer of the Missouri State court, but the person designated by law (the Missouri State law) to take the property of any dissolved life insurance corporation of that State and hold and dispose of it in trust for the use and benefit of creditors and other parties interested. The law which clothed him with this trust was in legal effect part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. * * * We are aware that, except by virtue of some statutory authority, an administrator appointed in one State cannot generally sue in another, and a receiver appointed by a State has no extraterritorial power. But a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. * * * No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with, perhaps, the exception of commercial corporations; but if it does, without limitation express or implied, the corporation comes in as it has been corporated. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

Relfe *vs.* Rundle, 103 U. S., 222, pp. 225–226.

The same rule was laid down in Fry *vs.* Charter Oak Life Ins. Co., 31 F. Rep., 197.

In a later case the United States Supreme Court adheres

to the rule above stated. The following citation will not show fully how far that court carried the rule; a careful reading of the case will only disclose that:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (Bank of Augusta *vs.* Earl, 13 Pet., 588), though it may do business in all places where its charter allows and the local laws do not forbid (Railroad *vs.* Koontz, 104 U. S., 12). But wherever it goes for business it carries its charter, as that is the law of its existence (Pelps *vs.* Rudle, 193 U. S., 226), and the charter is the same abroad as it is at home. Whatever disabilities are placed on the corporation at home it retains abroad, and whatever legislative control it is subject to at home must be recognized and submitted to by those who deal with it elsewhere. * * * He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony."

Canada So. R'y *vs.* Gebhard, 109 U. S., 527–537.

The supreme court of California so holds in passing upon the identical statute involved in this case, as follows:

"It would seem, however, that the New York statute was intended to cut deeper, and as a matter of public policy to inhibit forfeitures by life insurance companies, except by the method therein provided. * * *

"The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not the power to do, if attempted to be done by it, is *ultra vires*, and void. * * *

"A corporation being the creature of the law must confine its functions to the limits prescribed for its action, and if the law expressly inhibits it from doing a given thing it is powerless to do that thing, and, if it can do it only in a given manner, the prescribed method becomes the measure of its power.

"We are not met with any suggestion that the statute in question is violative of any chartered right of the defendant, and, in the absence of a showing to the contrary, must

assume the New York statute to be in consonance with its constitutional and chartered rights.

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away.

"The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Griffith *vs.* New York Life Ins. Co., 101 Cal., 627, on pp. 641, '2.

The supreme court of Texas has held that a contract made between a railroad chartered by Missouri and one of its officers in Texas, where the contract was to be wholly performed, but which was contrary to the statute of Missouri prohibiting such corporations from making any contract with one of its directors, was absolutely void. Its opinion in part is as follows:

"Appellee owes its existence to the constitution and laws of the State of Missouri, under and by virtue of which it obtained its being and from which it derived all its powers. Natural persons may make any contract or perform any act not prohibited by law, while artificial persons—corporations—can do only those things which by express grant or necessary implications they are authorized or empowered to do by the State under which their charters were obtained. * * * Had the contract been entered into by the president and secretary of the company, after resolution adopted by the board of directors authorizing them to make it, and had it been executed with strict observance of all formalities, it would have been void, because it was prohibited by the laws of the State from which appellee derives its existence and powers."

Rue *vs.* Missouri Pac. R'y Co., 74 Tex., 474-479.

The point is expressly decided by the court of appeals of Illinois in Equitable Ins. Co. *vs.* Frommhold, 75 Ill. App., 43, from which we quote:

"Appellant's counsel contend, first, that the contract was consummated in this State, and therefore that the New York statute has no application; and, secondly, that even though it be conceded that the statute applies, the policy was declared forfeited in conformity with its requirements. The argument of appellant's counsel on the first proposition consists of the discussion of the question whether the contract of insurance is a New York or an Illinois contract, apparently assuming that if it is the latter the New York statute can have no application, it not being a part of the contract and the contract making no reference to it. In this assumption we cannot concur. The question is one of power in the appellant corporation, namely, whether it had power to declare the policy forfeited otherwise than as prescribed by the New York statute. The validity of the statute is not questioned, nor is it questioned that appellant did business in New York or that the policy is such as is within the prohibition of the statute."

The court then discusses the question at great length as to whether or not this statute is a limitation on the power of the corporation. It shows, by reason and in entire accord with the great weight of authority, that such is the case. We ask the court's most careful attention to this case. It discusses the question fully and in a most able manner. It closes the discussion in these words:

"Our opinion being that the appellant is, by reason of the New York statute, powerless to declare a policy of insurance forfeited, otherwise than as therein prescribed, and that irrespective of the question whether the policy is a New York or an Illinois contract, a decision of the latter question is unnecessary. However, inasmuch as the application was forwarded to New York and there accepted, and the policy was there issued and returned to Chicago for delivery, and the premiums and the amount issued were, by the policy, expressly made payable in New York, authorities

are not wanting in support of the proposition that New York is to be regarded as the place of the contract (Phinney *vs.* Mutual Life Ins. Co., 67 Fed. Rep., 493)."

3.

THE LEGISLATURE INTENDED BY THE ACT OF '77 THAT ITS PROVISIONS SHOULD APPLY TO POLICIES ISSUED UPON THE LIVES OF NON-RESIDENTS AS WELL AS RESIDENTS OF NEW YORK, WHATEVER BE THE PLACE OF CONTRACT OR WHEREVER THE PREMIUMS BE DEMANDABLE.

If this proposition is sound, the applicability of the statute is established regardless of the place of execution or performance of the contract.

It was persistently urged by the plaintiff in error in the lower court, and we presume will be here, "that the statute of 1877 has never been construed by the court of New York to require notices to be sent of premiums demanded or permitted to be paid outside of New York State." Notwithstanding this claim, it is nevertheless true that the court of appeals of New York has twice decided that it is incumbent upon insurance companies incorporated by the State of New York to send the statutory notices to non-residents where in one case the premiums had for several years been demanded and paid outside of New York, and in the other case the company had a right to demand payment of premiums outside of New York. The first case is that of Carter *vs.* Ins. Co. (110 N. Y., p. 15). Mr. Carter took out a policy of insurance in the Brooklyn Life Insurance Company, a corporation chartered by the State of New York. The contract was made six years before the enactment of the statute of 1876.

Mr. Carter paid his premiums prior to 1877 in Georgia, but for 1878 to 1882 he remitted to New York. In

1883 the company failed to serve him with the statutory notice. Here was a policy-holder residing in Georgia. Here the company had been accustomed to collect the premium in Georgia and later in New York. The court held that it was incumbent upon the company to serve the statutory notice on Mr. Carter, a resident of Georgia, and in so deciding used this language:

"Upon this state of facts several questions arose upon the trial among which the material ones are:

"First. Whether the law of 1876 requiring notice to be sent to the policy-holders, applies to this policy? * * *

"It is contended by the appellant that the act applies only to policies 'issued or renewed' after its passage, and that a policy cannot be said to have been renewed unless it has become forfeited or lapsed, and has been afterward restored or renewed by the insurance company.

"The language of the statute, as expressed in the laws of 1876, is that 'no life insurance company, doing business in the State of New York, shall have power to declare forfeited or lapsed any policy thereafter issued or renewed, by reason of non-payment of annual premiums, or interest, or any portion thereof, unless a notice in writing stating the amount of the annual premium or interest due, and when due on such policy, and the place where said premium or interest may be paid shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last-known post-office address, not less than thirty days nor more than sixty days next before such payment becomes due according to the terms of such policy.' This act was amended by chapter 321, Laws of 1877, but, so far as this case is concerned, in no respect rendering a particular notice of the amendment necessary. The act should be construed according to the popular signification of the language used, and with the view of securing to the policy-holders in life insurance companies the benefits contemplated by the legislature. * * *

"We are also of the opinion that the payment, and receipt by the company, of each annual premium constitute a renewal of the policy within the meaning of the term 'renewal' as used in the act.

"While it was provided by the policy that it should con-

tinue for the term of the natural life of the assured, it was expressly provided that this was upon the condition that he should pay the annual premiums as they become due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void, and of no effect, but when paid it continued by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. * * *

"We are, therefore, of the opinion that the plaintiff's policy was renewed within the meaning of the act. We are also of the opinion that no such notice was given to him as the statute required. The law reads that the notice should be sent to the assured at his known place of address, and there is no claim but that the defendant knew his place of address at all times subsequent to the year 1880."

To the same effect is the case of Baxter *vs.* Ins. Co., 119 N. Y., 450. The defendant in that case was a corporation chartered by the State of New York. In May, 1884, it insured one J. J. Matteson. It does not appear from the opinion or statement by the court of what State Mr. Matteson was a resident. In the case of Mutual Life Ins. Co. *vs.* Phinney, No. 12 of this term, we filed copies of the complaint, answer, policy, and case and exceptions, all duly certified as correct by the clerk of the court of appeals, all of which are printed in the appendix to this brief. The policy provided for the payment of same upon proof of the death of the insured, "Joel J. Matteson, of Bradford, in the county of McKeon, State of Pennsylvania." The policy was issued in May and the insured died about four months thereafter, or a month after the second quarterly premium became due by the terms of the policy. The evidence showed that for ten years prior to his death he lived in Pennsylvania, where he died. It will be noticed also that the policy provides no particular place for the payment of the premium, so in this case the company had a right to demand the payment

of premiums at the home of Mr. Matteson in Pennsylvania. In case of such demand Mr. Matteson would have had no legal right to make payment elsewhere. So here we have a case where the insured was a non-resident of New York, and "where the premium could be demanded and could be paid outside of New York." After Mr. Matteson's death Mrs. Matteson assigned the policy to Mr. Baxter, presumably a citizen of New York, between whom and the company a controversy arose over the payment of the policy. The company claimed the policy was forfeited by Mr. Matteson in his lifetime on account of the non-payment of a quarterly premium. There was no proof offered by either party as to the service of the statutory notice, Mr. Baxter claiming that under this statute it was not necessary for him to prove that the company had not served the notice, the company contending that it was. The court held that it was incumbent on the company to prove the service of this notice on Mr. Matteson, a resident of Pennsylvania, as condition precedent to its right to defend on the ground of a forfeiture of the contract for non-payment of the stipulated premium, and, in so deciding, the court uses this language:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877. This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way, and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

The circuit court for the district of Washington in the case of Phinney *vs.* The Mutual Life Insurance Company (67 Fed., 493) discusses the statute from the same point of view (p. 497) in this language:

"I think that the binding force of the statute applies to all companies equally. It applies to all New York companies as to all business which they do in that State, and it applies to Connecticut companies as to all business which they do in New York. I think that if a Connecticut company having an office in New York, writing and issuing policies there, collecting the premiums there, and doing all the business of life insurance companies in the State of New York, should receive an application at its office in New York from Washington, act upon it there, issue a policy there, which by its terms will be performed in the State of New York, the contract would be governed by the law of New York just the same as though its incorporation was under the law of New York instead of being under the law of Connecticut. This statute has been upheld by so many decisions that it is beyond question a valid statute with respect to all business transacted within New York. Now this transaction, although the contract was made in the State of Washington, is business done in New York. The policy was written there. The default of the insured and right of forfeiture could only occur in New York, because there could be no default in payment until on the date when the premiums were due the insured failed to pay the premiums in New York. There is where the default occurred upon which alone this company can claim to be released from its liability under the policy."

To illustrate the unwillingness of the courts to give the statute the narrow construction contended for by the plaintiff in error, we call the attention of the court to the case of Hebb *vs.* Insurance Co., 138 Pa. St., 174–180; 20 Atl., 837. The case was upon a policy of fire insurance issued by the defendant, a Pennsylvania corporation, upon property located in the State of West Virginia. The question arose as to whether the application was a part of the contract, it being referred to therein, but not being attached thereto. The statute of Pennsylvania of May 11, 1881 (Public Laws, 20), provides "that all life and fire insurance policies upon the lives or property of persons within this Commonwealth, whether issued by companies organized

under the laws of this State or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contracts, shall contain or have attached to said policy correct copies of the application as signed by the applicant, and the by-laws referred to, and unless so attached and accompanying the policy no such application, constitution, or by-laws shall be received in evidence in any controversy between the parties to or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties." (We find the statute in the brief of counsel in the case of New Era Life Insurance Co. *vs.* Musser, 120 Pa., 384: 14 Atl. Rep'r, 155.) Upon this question the supreme court of Pennsylvania in the case cited says:

"It is urged, however, that this act of 1881 applies only to policies upon the lives or property of persons within this Commonwealth, and that as the property insured by the defendant was located in West Virginia the rule above stated does not apply. We regard this as a narrow construction of the act. We think that it was intended to produce a uniform rule of procedure and to apply to all insurance companies incorporated by the laws of this State, and to all other insurance companies insuring lives or property within this State."

The case of The Fidelity Mutual Life Insurance Association *vs.* Ficklin, 74 Md., 172: 21 Atl. Reporter, 680, is also in point.

The court of civil appeals of Texas in Insurance Co. *vs.* Fields, 26 S. W., 280, announces the same doctrine in this language:

"The laws of New York (referring to the statute regulating forfeitures of life insurance) would apply to contracts made by insurance companies chartered under its laws,

whether the contracts were made in New York or in any other State in the Union."

To the same effect are—

Mullen *vs.* Insurance Co., 89 Tex., 259.
Goodwin *vs.* Insurance Co., 97 Ia., 226.
Insurance Co. *vs.* Pollard, 94 Va., 146.
Central Bank *vs.* Hume, 128 U. S., 195.

4.

THE LEGISLATIVE INTENT TO EMBRACE ALL POLICIES WITHIN THE ANTI-FORFEITURE ENACTMENT IS MADE MANIFEST BY THE ACT OF 1892.

The establishment of this proposition renders immaterial inquiry as to residence of parties or the place of execution or performance of contract, including any question as to the place at which premium payments are demandable.

The anti-forfeiture law of 1876, as amended by the act of 1877, was an enactment complete in itself—*i. e.*, it was not a part of but was enacted separately from the general insurance laws of the State. In 1892 the legislature of New York codified its various prior insurance enactments into one act in one chapter, and embodied in it the anti-forfeiture act of 1876 (with some modification). While it is true that the said act of 1876–'7 is enumerated in its schedule of laws repealed, it is also true that a subsequent section of the act (of 1892) continued the act of 1876–'7 in force so far as consistent with its substitute. This subsequent section, 292 (p. 2681), reads as follows:

"The provisions of this chapter, so far as they are substantially the same as those of laws existing on September 30, 1892, shall be constructed as a continuation of such laws, modified or amended according to the language employed in this chapter and not as new enactments." * * *

Section 291 saves rights "accruing, accrued, or acquired * * * prior to October 1, 1892, under or by virtue of the laws so repealed, but the same may be enjoyed, asserted, enforced, prosecuted, or inflicted as fully and to the same extent as if such laws had not been repealed." * * *

In their brief filed in support of the application for the writ of certiorari in this case counsel for the company contend that if either statute (1876–7 or 1892) were applicable, it would be the act of 1892, and they use the act of 1892 as the basis of their argument of the inapplicability of any statute. If it is correct to test the applicability of the anti-forfeiture acts by weighing the language of the act of 1892, certainly counsel will not object to looking at the *entire act* to ascertain the legislative intent as to any part of it. To do so is to demonstrate the applicability of the anti-forfeiture law to the policy at bar. Sections 1 and 37 of the act of 1892 are as follows:

"SEC. 1. This chapter shall be known as the insurance law, *and shall be applicable to all corporations authorized by law to make insurances.*

"SEC. 37. Any domestic insurance corporation, heretofore incorporated or extended under the provisions of any general or special law of the State, is hereby brought under all the provisions of this chapter relating to such corporation."

5.

By their petition for the writ and their brief in support thereof, counsel for the plaintiff in error raise a question whether the act of 1876 *as amended*, being of a general nature, applies to the plaintiff in error. In support of the negative thereof, counsel assert that plaintiff in error was created by a special charter. This assertion may or may not be correct, but certain it is that it finds no support in the record. In the complaint (par. 1) it is alleged "that the defendant is a corporation duly organized and existing under and by virtue of the *laws* of the State of New York

for the purpose of carrying on a life insurance business." This allegation is admitted by the answer, and it is twice (Rec., pp. 13, 15) affirmatively alleged in the answer "that the said defendant is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the *laws* of the State of New York for the purpose of carrying on a life insurance business."

There is nothing else in the record touching the question except the provision in the application bringing it under the "charter of the company" *and* "the laws of New York." So that whatever may be the truth of the matter, the record establishes the fact to be that plaintiff in error is not the creature of a private or special act.

If there is in existence such a special act or charter, the court does not take judicial notice of it, because judicial notice is confined to general laws. Private or special acts are to be alleged and proven like other *facts*.

Leland *vs.* Wilkinson, 6 Peters, 317.
Bank *vs.* Gruber, 87 Pa. St., 468.

But if it be true that the plaintiff in error was created by special charter, it is conceded by plaintiff in error that the legislature of New York might lawfully amend its charter in this way (brief in support of petition, p. 27). It is also conceded that such amendment may be effected without direct reference to the special act. It is also conceded that the amendment of the special act was effected if it is made clearly manifest by the general act that it was the legislative intent to include its specially chartered insurance corporations. We submit that such legislative intent is manifest from the language of the act of 1877, "No life insurance company doing business in the State of New York shall have power," etc. Such legislative intent is clearly manifest in the act of 1892 (secs. 1, 37, 92).

6.

THAT THE LEGISLATURE OF WASHINGTON HAS IMPOSED NO LIKE RESTRICTION UPON THE POWER OF INSURANCE COMPANIES DOES NOT ENLARGE THE POWERS OF CORPORATIONS OF OTHER STATES.

A corporation created by the State of New York and empowered to enter into certain contracts or classes of contracts only cannot lawfully contract otherwise anywhere. When it goes outside of New York it carries its impediment with it. If it goes into (say) the State of Missouri, the legislature of that State may impose additional restrictions upon its power to contract in Missouri, or it may not. If not, the corporation deals in Missouri just as in New York. If the legislature of Missouri lays added restrictions upon its powers or methods of contracting, it must conform thereto, and provisions in its contracts conflicting therewith are unenforceable. This we understand to be the doctrine of the Clements case, 140 U. S., 226.

Insurance Co. *vs.* Pollard, 94 Va., 146.
Fidelity Ins. Co. *vs.* Ficklin, 74 Md., 172.
Rue *vs.* R'y Co., 74 Tex., 474.
Canada So. R'y Co. *vs.* Gebhard, 109 U. S., 527–537.
Relfe *vs.* Rundle, 103 U. S., 222–225.

We apprehend that if Missouri imposed a restriction upon its contracting, compliance with which was forbidden by New York, it could only withdraw from Missouri.

Now, to apply the principle to the case at bar:

The plaintiff in error was forbidden by its creator, the legislature of New York, to enter into a contract of insurance terminable otherwise than in a certain manner and at a certain time (30 days after the happening of a certain event).

The statute imposed this time feature as well as the method upon the contracts of plaintiff in error, *however* they should be written or worded by the parties to them. If Mr. Sears had been a resident of New York State, counsel would not question but that the policy would have been subsisting at the time of his death. The company, being under such a disability, sends to Washington and solicits like business. The State of Washington permits it to do so. It would be most unreasonable to construe the permission to be intended as an enlargement of the powers of the company. Counsel for plaintiff in error would imply to the legislature of Washington an intent to authorize the foreign corporation to exceed the powers it has at its home and exercise in Washington powers or privileges forbidden it in New York, all for the purposes of working a disadvantage to its own citizens. This contention of counsel for plaintiff in error has not met with favor before the supreme court of Washington.

> Griesemer *vs.* Mutual Life Ins. Co. of N. Y., 10 Wash., 202–212.

The counsel for plaintiff in error in their brief call attention to the Washington statute relating to foreign corporations, and assert that the plaintiff in error had complied therewith prior to its transaction with Mr. Sears, but the record in this case does not support the assertion. The only reference in the pleadings to the matter is contained in paragraph II of the affirmative defenses (Rec., pp. 13–16), each of which reads as follows:

"That prior to and ever since the eighteenth day of May, 1891, the defendant has been engaged in carrying on its business of life insurance in the State of Washington, and has had during the said time and now has an agent representing it in said State, conducting its said business, and during said times had its soliciting insurance agents and medical examiners residing in said State of Washington,

and has complied with the laws of said State of Washington relating to foreign corporations transacting business therein."

II.

The Waiver of Statutory Notice Contained in the Policy is Ineffectual. To Hold Otherwise would be to Permit the Parties to Nullify the Statute.

According to the language of the policy (including the waiver provision), the premium for any given year was payable on May 18 of that year, and a failure to pay on that day put the insured in default and terminated the insurance.

According to the language of the statute, failure to pay on May 18 did *not* put the insured in default and did *not* terminate the contract. The insured was in default only if he failed to pay within thirty days after notice, and only *such* a default terminated the insurance. (That such is the effect of the statute is shown on the authority of the decisions of the New York court of appeals, *infra*, under the division III of the brief, to which we beg leave to refer the court.)

Which of these two inconsistent provisions controls?

The court of appeals of the State of New York, in the case of Baxter *vs.* Brooklyn Life Insurance Co., 119 N. Y., 450, in speaking of this particular statute in its relation to a policy issued by a New York life insurance company to and insuring the life of a resident of the State of Pennsylvania, uses this expression:

"This statute was a part of the contract in question and governed the rights and obligations of the parties, &c. * * * It is obvious that this statute, when imported into the contract, modified its conditions in very material respects." * * *

The same court, in De Frece *vs.* Insurance Co., 136 N. Y., 144, in speaking of the same statute in its relation to a life policy, says:

"The contract is to be read as if the act * * * had been literally incorporated into it."

The supreme court of New York, in Fischer *vs.* Ins. Co., 56 N. Y. Supp., 260, says:

"The conditions of the policy are controlled by the provisions of the statute," and * * * "the conditions of the policy are altered by the provisions of the statute."

The supreme court of the State of Washington, in speaking of the same point in Griesemer *vs.* Mutual Life Insurance Co., 10 Wash., 202–210, thus expresses the relation between the statute and the policy:

"It follows that the policy was governed by the statute."

The supreme court of California, in Osborne *vs.* Home Life Insurance Co., 123 Cal., 610; 56 Pac. Rep., 616, adopts both of the above-quoted expressions of the New York court of appeals.

The supreme court of Texas, in the case of Mullen *vs.* Mutual Life Insurance Co., 89 Tex., 259; 34 S. W. Rep., 605, in speaking of the same question, says:

"We think the provisions of the New York statute * * * entered into and became a part of the contract between the parties."

The supreme court of Michigan, in the case of Warner *vs.* Association, 100 Mich., 157, in speaking of the same statute and its relation to a life policy to which it was applicable, says:

"These statutory provisions form a part of the contract of insurance and cannot be waived by the parties."

The United States circuit court of appeals for the second circuit, sitting in the State of New York, in the case of Hicks *vs.* Insurance Co., 60 Fed. Rep., 690; 9 C. C. A., 215, in discussing the relation of this statute to such a policy, uses this language:

"The policies * * * were, of course, dominated by the statute * * * as completely as though the statutory conditions had been explicitly incorporated in them."

The United States circuit court of appeals for the ninth circuit, in the case of Nixon *vs.* Insurance Co., 81 Fed. Rep., 802; 26 C. C. A., 620, and in Equitable Life Ass'n *vs.* Trimble, 83 Fed. Rep., 85; 27 C. C. A., 404, says of the relation between that statute and such a policy:

"The statute is mandatory and controls the contract."

The United States circuit court of appeals for the sixth circuit, in the case of Rosenplanter *vs.* Provident Society, 96 Fed. Rep., 721; —C. C. A., —, in considering the relation between the New York statute and a like life policy of insurance, speak of the policy as being "dominated by the statute."

So that it may be regarded as so far thoroughly established that if the statute is to be regarded as a part of the contract it is the controlling part of it; and, on the other hand, if it is to be said that the statute is not a part of the contract between the parties, yet it is equally true that by a will superior to that of the contracting parties their contract is dominated and overruled by the statute at every point of conflict between them.

It has been repeatedly decided that the waiver provision is ineffectual.

The supreme court of California states its conclusion thereon in the following language:

"It would seem, however, that the New York statute was intended to cut deeper, and as a matter of public policy to

inhibit forfeitures by life insurance companies, except by the method therein provided.

'No life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of premium, etc., except as therein provided.'

The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not the power to do, if attempted to be done by it, is *ultra vires* and void.

Admit that Griffith attempted to waive all notice of non-payment of premiums, if the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a waiver involves the right of the contracting parties to make and accept such waiver—consent never gives jurisdiction not otherwise possessed of the subject-matter to a court, for the reason that it lacks the power to adjudicate such subject-matter, except as conferred by law.

A corporation being the creature of the law must confine its functions to the limits prescribed for its action, and if the law expressly inhibits it from doing a given thing it is powerless to do that thing, and, if it can do it only in a given manner, the prescribed method becomes the measure of its power.

We are not met with any suggestion that the statute in question is violative of any chartered right of the defendant, and, in the absence of a showing to the contrary, must assume the New York statute to be in consonance with its constitutional and chartered rights.

The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away.

The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Griffith *vs.* New York Life Ins. Co., 101 Cal., 627, on pp. 641, '2.

The supreme court of Michigan announced the same result in construing a policy of insurance made in New York and subject to a similar law made in reference to assessment societies passed in 1892. It uses the following language:

"The contract of insurance was made in the State of New York, and is governed by the laws of that State. * * * The notice sent to the insured, in the present case, did not comply with this statutory provision. The design of the statute is apparent. A policy in a regular life company fixes both the time of payment of premium and the amount thereof; yet that same statute provides that no life insurance company can declare forfeited or lapsed any policy by reason of the non-payment of any premium without notice, and prescribes what such notice must contain. It further provides that, in case payment is made within the life of the notice, it shall be taken to be in full compliance with the requirements of the policy, anything therein contained to the contrary notwithstanding. *These statutory provisions form a part of the contract of insurance and cannot be waived by the parties.* In their absence the parties are bound by the stipulations in the contract. Fixed premiums, payable bimonthly or otherwise, are incidents of regular life policies. Assessments are essential incidents of co-operative associations organized under this statute, and notice through some medium is requisite. The statute relating to assessment companies does not undertake to fix the time of the notice, but it does fix and determine what the notice must contain. The statute contemplates that through these notices the policy-holder shall be advised of the cause and purpose of the assessments; and the statute cannot be avoided by a condition attached to the policy, that, in case no notice is given, the insured shall be required to forward to the association an amount equal to the previous assessment. In the present case the association did give notice of the assessment, which was a sum greater in amount than the previous assessment; and, not having given such notice in the manner prescribed by the statute, it cannot be allowed to declare a forfeiture of the policy by reason of its non-payment."

Warner *vs.* Life Association, 100 Mich., 157, on p. 159-160.

In Insurance Co. *vs.* Pollard, 94 Va., 146, the court says:

"It (the statute) is therefore as much a part of every contract of life insurance governed by the laws of the State of Ohio and made after that statute was passed as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws, and no waiver of the parties nor stipulations in the contract can change the law."

In this case the insured resided in Virginia, where the contract was consummated. The insurer was an Ohio corporation. The parties stipulated that the contract was subject to the laws of Ohio.

In Insurance Co. *vs.* Ficklin, *supra*, the court (on the rehearing) says:

"The Pennsylvania statute enacted that whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture. * * * In other words, the statute is to be entirely overthrown and set aside, and the insurance company, under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way. * * * Neither can an agreement be valid which gives an effect to a warranty which is in defiance of the statute. The legislature enacted a rule for the regulation of the contracts of insurance companies, which is a matter of public interest and concern. The operation of the rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts; on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from them. * * * The contract of insurance must be made in subordination to the statute, and must have the legal effect which the statute attributes to it, and none other. Whatever form of words may be used, the legal effect of the warranty must be such as the statute impresses upon it. It was the intention of the legislature to prevent insurance companies from for-

feiting policies by means of warranties, as they had been previously construed, and to enforce the new construction set forth in the statute. These corporations, manifestly, have not the legal capacity to made a contract which should give a construction to a warranty in opposition to that which the law has established, and of course they cannot by virtue of any agreement acquire the competency to do that which the law forbids. * * * The materiality of the statement is the indispensable condition on which the invalidity of the policy depends, and it must be established by proof. *It is not competent to substitute for this proof an agreement of the parties that it should be considered material.* Neither can an agreement be valid which gives an effect to a warranty which is in defiance of the statute. The legislature enacted a rule for the regulation of the contracts of insurance companies, which is a matter of public interest and concern."

In the case last cited the insurer was a Pennsylvania corporation; the contract was consummated in Baltimore; the insured resided in Virginia; the contract was silent as to place of performance, and contained no stipulation making it subject to the laws of Pennsylvania.

To the same effect are the following cases:

Insurance Co. *vs.* Nixon, 26 C. C. A., 620; 81 Fed., 796.
Insurance Co. *vs.* Trimble, 27 C. C. A., 404; 83 Fed., 85.
Osborne *vs.* Ins. Co., 123 Cal., 610; 56 Pac. Rep., 616.
Mullen *vs.* Ins. Co., 89 Texas, 259; 34 S. W. Rep., 605.
Hermany *vs.* Ins. Co., 151 Pa. St., 17.
Reilly *vs.* Ins. Co., 43 Wis., 449.
Insurance Co. *vs.* Smith, Tex. C. C. A.; 41 S. W. Rep., 680.
White *vs.* Ins. Co., 4 Dillon, 177.
Emery *vs.* Ins. Co., 52 Me., 322.
Ins. Co. *vs.* Rudwig, 80 Ky., 223.
Chamberlain *vs.* Ins. Co., 55 N. H., 249.
Holmes *vs.* Charter Oak Ins. Co., 131 Mass., 64.
White *vs.* Ins. Co., 163 Mass., 108.

It is respectfully submitted that discussion of the question is concluded by the case of Wall *vs.* Insurance Co., 32 Fed., 273, and 140 U. S., 226. In this case the company, a New York corporation, issued a life policy to Wall, a resident of Missouri. A Missouri statute provided that after the payment of two annual premiums default in payment of premium should not terminate the policy but the policy should continue in force for so long a time as four-fifths of the net reserve on the policy taken as a single premium would carry it. The application contained a waiver of the statutory provision. The court (circuit and supreme) held that the Missouri statute was applicable to the policy. The question then arose as to the effect of the waiver.

Brewer, J., held (at circuit):

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive—in fact, no words of negation in any direction—yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce (Railway Co. *vs.* Peavy, 29 Kan., 169). The legislature has by this language declared a rule in respect to forfeitures in life-insurance policies; it has thus established the policy which it believes should obtain in this State, and, though sitting on the Federal bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit."

The case and question subsequently came before this court, and it was held:

"It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium

after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

The insurer in that (the Clements) case was a New York corporation. The New York statute permitted forfeiture of the policy for non-payment of premium only upon a certain contingency. The Missouri statute imposed a further restriction upon forfeiture. This court held that the waiver in the application of "all right * * * required by a statute of any State * * *" was ineffectual. The language of the New York statute, "no policy of insurance on life * * * shall after payment upon it of two full annual premiums become forfeited or void by reason of the non-payment of premium thereon, but shall be subject to the following rules and commutations," is at least as positive as that of the Missouri statute. Is not, then, the ruling in the Clements case a direct holding that the waiver in this policy is ineffectual?

Overruled Cases Cited by Plaintiff in Error on Question of Waiver of the Statute of New York.

In the Phinney case counsel for the plaintiff in error cited certain authorities in support of their claim that the waiver clause of the policy overrides the statute. Certain of them have since been overruled.

The case of Insurance Co. *vs.* Curray, 13 Bush, 312, was distinctly overruled in the case of Ins. Co. *vs.* Rudwig, 80 Ky., 223, on page 235, as follows:

"And when parties have entered into an insurance contract since the adoption of this statute they must be held as contracting with reference to the statutory provision, and,

we might add, subject to a like rule, recognized by this court regardless of the statute, and therefore that portion of the opinion in the case of The Farmers' and Drovers' Bank against Curray, expressing a contrary view, is overruled."

The cases of Desmazes *vs.* Ins. Co., 7 Fed., 529, and Caffery *vs.* Ins. Co., 27 Fed., 25, both relating to the law of Massachusetts passed in 1861 and holding to the effect that that statute could be waived, are disapproved, the first named specifically and the latter on principle, in the case of Holmes *vs.* Ins. Co., 131 Mass., at page 64. They are cited also with disapproval by Judge Dillon in the case of White *vs.* Ins. Co., 4 Dill., 177; also in the cases of Griffith *vs.* Ins. Co., 101 Cal., 627, and Ins. Co. *vs.* Rudwig, 80 Ky., 223, on the ground that they were contrary to the great weight of authority. If they are, as claimed by plaintiff in error, they are surely contrary in principle to the case of Clements *vs.* Ins. Co., 140 U. S., 226. It is to be noted, however, that in the Desmazes case the alleged waiver took place subsequent to the delivery of the policy, and *was supported by a new consideration*, viz., the acceptance of a new (paid-up) policy in lieu of the old. In the Caffery case the effect of the holding is that in a forfeitable policy the anti-forfeiture law of Massachusetts could not be waived, but could be waived by the parties adopting in the first instance a policy non-forfeitable in any event. The other cases cited on this proposition are so clearly not in point that we shall not discuss them.

If this court should be of the opinion that upon the enactment of the act of 1892 all outstanding policies which were within its terms came under it, and that this policy is controlled by it, there is to be found in the act another implication of the legislative intent to forbid a waiver of the notice. By the act there are two privileges of the insured forced upon the insurer. One is the extended insurance privilege, the other the privilege to pay a passed premium

after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

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"And when parties have entered into an insurance contract since the adoption of this statute they must be held as contracting with reference to the statutory provision, and,

we might add, subject to a like rule, recognized by this court regardless of the statute, and therefore that portion of the opinion in the case of The Farmers' and Drovers' Bank against Curray, expressing a contrary view, is overruled."

The cases of Desmazes *vs.* Ins. Co., 7 Fed., 529, and Caffery *vs.* Ins. Co., 27 Fed., 25, both relating to the law of Massachusetts passed in 1861 and holding to the effect that that statute could be waived, are disapproved, the first named specifically and the latter on principle, in the case of Holmes *vs.* Ins. Co., 131 Mass., at page 64. They are cited also with disapproval by Judge Dillon in the case of White *vs.* Ins. Co., 4 Dill., 177; also in the cases of Griffith *vs.* Ins. Co., 101 Cal., 627, and Ins. Co. *vs.* Rudwig, 80 Ky., 223, on the ground that they were contrary to the great weight of authority. If they are, as claimed by plaintiff in error, they are surely contrary in principle to the case of Clements *vs.* Ins. Co., 140 U. S., 226. It is to be noted, however, that in the Desmazes case the alleged waiver took place subsequent to the delivery of the policy, and *was supported by a new consideration*, viz., the acceptance of a new (paid-up) policy in lieu of the old. In the Caffery case the effect of the holding is that in a forfeitable policy the anti-forfeiture law of Massachusetts could not be waived, but could be waived by the parties adopting in the first instance a policy non-forfeitable in any event. The other cases cited on this proposition are so clearly not in point that we shall not discuss them.

If this court should be of the opinion that upon the enactment of the act of 1892 all outstanding policies which were within its terms came under it, and that this policy is controlled by it, there is to be found in the act another implication of the legislative intent to forbid a waiver of the notice. By the act there are two privileges of the insured forced upon the insurer. One is the extended insurance privilege, the other the privilege to pay a passed premium

within thirty days after notice with like effect as if paid at the due date. Section 88 of the act creates the former, section 92 the latter privilege. By section 88 a waiver of the former is permitted, viz:

"This section shall not apply to any case where the provisions of this section are specifically waived in the application, and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued."

The implication is that the legislature did not mean to permit a waiver of the other privilege.

III.

Estoppel in Pais.

It is urged by the plaintiff in error that the matters set up in paragraph 6 of the affirmative defense of its answer (Record, p. 18) constitute a complete defense to the action upon the policy, and that the action of the circuit court in sustaining the demurrer thereto was error. This contention must rest upon the theory that the facts therein alleged are sufficient to constitute an estoppel *in pais* against the plaintiff below.

In the discussion of this question it is proper to assume that the statute of New York appliés to the policy in suit; that there is in the case no departure from law to law, or at all; that tender prior to the commencement of the action was unnecessary; that the New York act of 1897 is inapplicable, and that in all respects the conditions of the policy as modified by the statute were performed by the insured. In brief, that unless this be a defense, the plaintiff was entitled to the judgment.

Having narrowed down the question to the precise point under discussion, it is proper to consider again the facts in

the case in the relation which they bear to this affirmative defense.

The Facts.

It is admitted by the pleadings that on May 18, 1891, the insurance company received from Sears $491, and in consideration of it issued to him the policy of insurance which is involved in the pending action. By this contract of insurance the company agreed to pay his executrix the sum of ten thousand dollars upon acceptance of satisfactory proofs of his death. Sears paid the first and second annual premiums—that is to say, the premiums payable May 18, 1891 and 1892. He failed to make payment of any subsequent annual premium. He died March 30, 1898. The policy provided that on the 18th day of May of each year following the year 1891 Sears should pay the sum of $491. The New York statute which was in force at the time the policy was issued (statute of 1877) provided that the policy might not be declared forfeited or lapsed by reason of non-payment of any annual premium, unless a notice stating when the premium should fall due, and that if not paid the policy will become forfeited and void, be mailed at least 30 and not more than 60 days prior to the due date of the premium (or a like notice should be given after default). The statute required such notice to state that *unless the premium be paid within* 30 *days after the mailing* of the notice the policy will become forfeited. The statute further provided that in case the payment demanded by the notice be made within the said 30 days such payment should be a *full compliance with the requirements of the policy* in respect of the payment of the premium, anything contained in the policy to the *contrary notwithstanding*, and the policy may not in any case *be* forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of the notice. The statute of 1892, which went into effect in October, 1892, is a re-enactment of the statute of 1877, above referred to, except that it

required the notice to be mailed at least 15 and not more than 45 days prior to the due date of the premium. It did away with the notice which the statute of 1877 provided might follow a failure to pay a premium at a due date. The statute of 1892 contains this provision:

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be *in full compliance* with the requirements of the *policy* in respect to the time of such payment, and no such policy shall in any case *be* forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of such notice."

No notice of any kind was mailed to Sears in the years 1893, 1894, 1895, 1896, or 1897. He died March 30, 1898.

The matter relied upon by the petitioner as constituting an estoppel is as follows:

"That subsequent to the failure of the said Stephen P. Sears to make payment of the said annual premium falling due on said policy, May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after the said Stephen P. Sears was fully informed and knew that said policy had been by it declared lapsed and void for non-payment of premium, this defendant, through its agents, applied to said Stephen P. Sears to make restoration of said policy by making payment of said defaulted premium and having the said policy restored to force, but that said Stephen P. Sears refused to make such payment and refused longer to continue said policy or make any further payments thereon, and then and there elected to have the same terminated, and this defendant, relying upon the said election and determination of said Stephen P. Sears, at all times subsequent thereto treated said policy as lapsed, abandoned and terminated, and relying upon the said conduct of said Sears abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof."

Argument.

While it is contended by defendant in error that it is the statute of 1877 which controls the case, yet in the discussion of this question it would be aside from the issue to discuss whether or not the statute of 1892 or that of 1877 controls the discussion, for neither statute was complied with by the petitioner, and it is equally immaterial to consider or determine whether the New York statute is to be said to be a part of the contract or incorporated in it or how the connection between the two should be called or classified. The courts, while using varying forms of expression, ultimately agree that when the New York statute applies, it *dominates* the policy.

The court of appeals of the State of New York, in the case of Baxter *vs.* Brooklyn Life Insurance Co., 119 N. Y., 450, in speaking of this particular statute in its relation to a policy issued by a New York life insurance company to and insuring the life of a resident of the State of Pennsylvania, uses this expression:

"This statute was a part of the contract in question and governed the rights and obligations of the parties. * * *
"It is obvious that this statute, when imported into the contract, modified its conditions in very material respects." * * *

The same court, in De Frece *vs.* Insurance Co., 136 N. Y., 144, in speaking of the same statute in its relation to a life policy, says:

"The contract is to be read as if the act * * * had been literally incorporated into it."

The supreme court of New York in Fischer *vs.* Ins. Co., 56 N. Y. Supp., 260, says:

"The conditions of the policy are controlled by the provisions of the statute" and "the conditions of the policy are altered by the provisions of the statute."

The supreme court of the State of Washington, in speaking of the same point, in Griesemer *vs.* Mutual Life Insurance Co., 10 Wash., 202–210, thus expresses the relation between the statute and the policy:

"It follows that the policy was governed by the statute."

The supreme court of California, in Osborne *vs.* Home Life Insurance Co., 123 Cal., 610; 56 Pac. Rep., 616, adopts both of the above-quoted expressions of the New York court of appeals.

The supreme court of Texas, in the case of Mullen *vs.* Mutual Life Insurance Co., 89 Tex., 259; 34 S. W. Rep., 605, in speaking of the same question, says:

"We think the provisions of the New York statute * * * entered into and became a part of the contract between the parties."

The supreme court of Michigan, in the case of Warner *vs.* Insurance Co., 100 Mich., 157, in speaking of the same statute and its relation to a life policy to which it was applicable, says:

"These statutory provisions form a part of the contract of insurance and cannot be waived by the parties."

The United States circuit court of appeals for the second circuit, sitting in the State of New York, in the case of Hicks *vs.* Insurance Co., 60 Fed. Rep., 690; 9 C. C. A., 215, in discussing the relation of this statute to such a policy, uses this language:

"The policies * * * were, of course, dominated by the statute * * * as completely as though the statutory conditions had been explicitly incorporated in them."

The United States circuit court of appeals for the ninth circuit in the case of Nixon *vs.* Insurance Co., 81 Fed. Rep., 802, 26 C. C. A., 620, and in Equitable Life Ass'n *vs.* Trimble, 83

Fed. Rep., 85, 27 C. C. A., 404, says of the relation between that statute and such a policy:

"The statute is mandatory and controls the contract."

The United States circuit court of appeals for the sixth circuit in the case of Rosenplanter *vs.* Provident Society, 96 Fed. Rep., 721, — C. C. A., —, in considering the relation between the New York statute and a like life policy of insurance, speaks of the policy as being "dominated by the statute."

So that it may be regarded as so far thoroughly established that if the statute is to be regarded as a part of the contract, it is the controlling part of it; and, on the other hand, if it is to be said that the statute is not a part of the contract between the parties, yet it is equally true that by a will superior to that of the contracting parties their contract is dominated and overruled by the statute at every point of conflict between them.

In order to appreciate the force of the facts constituting the alleged estoppel *in pais*, it is necessary to understand the rights of the parties at the time those facts transpired. The estoppel *in pais* is based upon an alleged conversation which took place some time after May, 1893, and prior to the death of Sears (which occurred on March 30, 1898), between an agent of the insurance company and Sears. What were the rights of Sears at the instant of time when this conversation was initiated? And what at the same moment were the rights of the company? It is necessary to first solve these inquiries from the record in this case, in order to reach a conclusion as to the effect upon those rights which that conversation and the events which followed it have; in other words, we should first ascertain the rights of the parties, and, weighing those rights, then test by them the sufficiency of the facts alleged as an estoppel.

On the 18th day of May, 1892, Sears paid the company the second annual premium. This payment had the effect

of insuring his life for the period of at least one year. This no one will dispute. During that period of one year his right under the policy was a valuable property right. If by that payment his policy became and remained a subsisting contract of insurance for a longer period than one year, it remained a valuable property right for such longer period. It does not appear from the allegations of the affirmative defense whether this conversation took place in the year 1893 (save that it does appear that it did not occur prior to May 18, 1893), nor whether it occurred in the year 1894, or in the year 1895, or in the year 1896, or in the year 1897, or in the year 1898 (save that it does appear that it must have occurred prior to March 30, 1898, that being the date of the death of Sears). But we claim that it does appear that whenever it occurred it was at a time when Sears' policy was a valid, subsisting contract of insurance; and we claim further that when it occurred Sears was not in default, was under no obligation to pay any premium or sum of money whatever to the company, so that, if he had died at the moment of time when the agent approached him for the purpose of the conversation, his executrix would have been entitled to receive from the company the sum of $10,000, less the deferred annual premium or premiums.

It is the contention of the defendant in error that upon the payment of the 1892 premium the policy was continued in force for a minimum period of one year. It was continued in force for the period of one year and until a statutory notice should be mailed, and for thirty days thereafter. The statutory notice not having been mailed during any subsequent year, the policy remained a valid, subsisting contract of insurance up to the time of the death of Sears. In the brief filed by the petitioner in support of the application for a writ of certiorari (which is the only statement by the plaintiff in error of its contention in this case to which we have access at this writing) it is claimed that the policy became forfeited by the failure to pay the 1893 premium,

and that the statute of New York forbade only the *declaration* of the forfeiture. It is contended, on the contrary, on behalf of the defendant in error, that the statute changed the default period from that named in the policy to another fixed by the statute. The insured did not suffer default by not paying on the several annual due dates named in the policy, but could be only in default if he failed to pay an annual premium within thirty days after the mailing of a statutory notice. This contention is based upon the language of the statute itself. (In the discussion of this question, while contending all the while that the statute of 1877 governs, we shall use the statute of 1892, since counsel for the petitioner seem to prefer that statute). The statute reads:

"If the payment demanded by such notice shall be made within its (the) time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment, and no such policy shall in any case be forfeited or lapsed until the expiration of 30 days after the mailing of such notice."

The effect which we claim from the statute has been given to the statute by the highest court of the State of New York, and we assume that it is only necessary to convince this court that the New York court of appeals has given that construction to that provision of the New York statute, and, if we do so, this court will unhesitatingly follow that decision. We undertake to do so, and to reinforce it by showing that the same construction has been placed upon that statute by every one of the United States circuit courts of appeal to whom the question has been presented, as well as by every State court which has passed upon it.

The attention of the court is especially directed to the decision of the court of appeals of New York in the case of Baxter *vs.* Brooklyn Life Insurance Co., 119 N. Y., 450 (the court in that case had before it the New York statute of 1877, the statute which was in force at the time the Sears

policy was issued and which we claim is the controlling statute), the language of which, bearing upon the point under consideration and paralleling the paragraph above quoted from the act of 1892, is as follows:

"In case the payment demanded by such notice shall be made within the 30 days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything contained therein to the contrary notwithstanding; that no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of such notice."

The Baxter Case.

It was an action upon a life-insurance policy. The complaint alleged the delivery of the policy, the death of the insured, the presentation to the company of satisfactory proofs of death, its refusal to pay, and that the insured had made the payments of the premiums according to his agreement with the company. No issue was made by the company upon any of the allegations of the complaint except the last, which it denied, and alleged affirmatively that a certain premium which came due before death had not been paid. On the trial the plaintiff put in evidence the policy and rested. The defendant moved a nonsuit on the ground that the insured had failed to comply with the conditions of the policy by neglecting to pay said premium. The motion was denied and judgment went for the plaintiff. The court holds that the production of the policy on the trial proved the payment of the first premium, "but it was essential to the maintenance of plaintiff's cause of action to show that the policy was a valid and subsisting contract at the time of the death of the insured. The policy itself contained a stipulation that it was a contract made and executed in the State of New York and construed only according to the laws of that State. Aside

from this provision of the policy, and under general rules of law, this contract was subject to the terms and conditions expressed in chapter 341 of the laws of 1876, as amended by chapter 321 of the laws of 1877. This statute was a part of the contract in question, and governed the rights and obligations of the parties precisely the same and to the same extent as if all its terms and conditions had been actually incorporated into the policy. The promise of the defendant was to pay to the beneficiary named the sum of three thousand dollars upon the death of the insured, in case that event occurred during the continuance of the contract. It therefore becomes important to inquire whether the policy in question was in force at the time of the death of the insured, on the 7th day of September, 1884. If upon that day it was a valid subsisting contract, notwithstanding the failure to pay the premium due on the preceding 24th day of August, then the very contingency upon which the defendant agreed to pay the amount of the insurance had happened."

The court here reviews the provisions of the statute and proceeds:

"There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute when imported into the contract modified its conditions in very material respects. The duration and validity of the policy is not, then, dependent upon payment of the premium on the day named therein, but upon payment within thirty days after the notice has been given. The condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium *within thirty days after notice*. The complaint alleges that the insured, up to the time of his death, made the payments on the policy as agreed with the defendant. That he actually paid the premium necessary to keep the policy in life until the 24th of August prior to his death was established and admitted. It was not necessary to prove that he also paid the premium on the 24th of August, because the contract

was not impaired by a failure to pay on that day, but by a failure to pay within thirty days after the defendant had served the statutory notice. The statute prescribes this notice as a necessary condition of forfeiture; and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. *In the absence of proof on the part of the defendant as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract as evidenced by the policy and the statute when read together.* Before the defendant could raise any question in regard to the non-payment of the August premium it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default or to raise any point based on his omission to pay the last quarterly premium. *It must therefore be assumed, in the absence of such notice, that the policy in question was in full force at the death of the insured;* and, even if the payment of the last premium was omitted, the obligation and promise of the defendant to pay upon death during the life of the policy was unimpaired."

The decision in the Baxter case has been approved by subsequent decisions of the court of appeals of New York. It was expressly reaffirmed on this point in the subsequent case of De Frece *vs.* Insurance Co., 136 N. Y., 144, in which the court says (page 151):

"The plaintiff was not bound to allege the proof of payment of the annual premiums when due. The contract is to be read as if the act * * * had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after due service of the notice required by law."

The decision in the Baxter case upon this point is in line with the prior decision of the same court in the case of Phelan *vs.* Insurance Co., 113 N. Y., 147. It is followed by the supreme court of New York in the case of Schad *vs.*

Insurance Co., 42 N. Y. Supp., 314, in which the following language is used:

"In this view of the case it is not necessary to consider the other questions raised. If the proper notice was not given, the assured at his death was not in default, and the defendant has no defense to the action."

The doctrine of the Baxter case upon this point has been followed by the supreme court of the State of New York in the recent case of Fischer *vs.* Metropolitan Life Insurance Co., 56 N. Y. Supp., 260, in which the court says:

"The effect of the statute was that, after the policy had once been issued, no act of the insured, by way of omission to pay the premium, could or does work a forfeiture of the policy. So far as it was concerned, the contract was a permanent one until some act of the defendant had been done by way of putting an end to it. Therefore, when any one entitled to sue upon it had occasion to bring an action, he was not compelled, as a condition of making out his cause of action, to show that the payment of premiums had continued after the policy had once taken effect, because by the express terms of the statute the policy remained a valid instrument between the parties until, after a default in the payment of the premiums, the company had served the notice and taken the action which was prescribed by the statute. * * * The allegation of the complaint, therefore, that the policy was an existing policy, was sufficiently established by the policy when read in the light of the statute. Before the defendant could raise any question in regard to the non-payment of the premium, it was necessary to show that it had complied with the statute by serving the notice, as this step was essential to put the assured in default or to raise any point based on his omission to pay the premium. * * * That the policy was therefore an existing contract between the parties was admitted by the pleadings, and the effect of the statute was that that contract, which had taken effect between the parties, remained a good and sufficient contract until a notice had been served requiring the payment of the premiums."

"No policy can be declared *or treated* as lapsed or forfeited until thirty days after notice to the policy-holder."

Stokes *vs.* Amerman, 121 N. Y., 337–343.

The doctrine of the Baxter case has been adopted by the circuit court of appeals for the ninth circuit in the following cases:

Provident Co. *vs.* Nixon, 73 Fed., 144–148.

New York Life Ins. Co. *vs.* Dingley, 35 C. C. A., 245; 93 Fed. Rep., 153.

(In this case the policy was issued in 1894, and therefore came under the act of 1892.)

Ins. Co. *vs.* Nixon, 26 C. C. A., 620; 81 Fed. Rep., 796.

Ins. Co. *vs.* Trimble, 27 C. C. A., 404; 83 Fed. Rep., 85.

Also the case of Mutual Life Insurance Co. *vs.* Dingley (not reported), in which case three of the policies involved were issued before and one after the enactment of the act of 1892. From the opinion (which we have in manuscript) we quote the following:

"It was no answer to the case made in the complaint to say that the insured had failed to pay premiums, and that thereby his policies were forfeited, for the law attaches no such result to that default."

The doctrine of the Baxter case is also adopted by the circuit court of appeals of the second circuit in the case of Hicks *vs.* The National Life Ins. Co., 9 C. C. A., 215; 60 Fed., 690; also by the circuit court of appeals of the sixth circuit in Rosenplanter *vs.* Provident Society, — C. C. A., —; 96 Fed. Rep., 721, from which the following is quoted:

"The effect of the prohibition against declaring a forfeiture of the interest of the assured under the contract was to keep the policy alive as a valid subsisting insurance, notwithstanding the stipulation of the parties to the contrary. The

duration of the policy, so long as it was dominated by statute, was not dependent upon the payment of the premium on the day named therein, but upon payment within thirty days after the statutory notice should be given. The only way in which the policy could be terminated under the statute was by the failure of the insured to pay his premium upon notice 'mailed' thirty days before the premium was due or by notice of forfeiture and demand for payment within thirty days after mailing such notice."

The aforesaid doctrine of the Baxter case is adopted bodily by the supreme court of California in the case of Osborne *vs.* Home Life Insurance Co., 123 Cal., 610; 56 Pac. Rep., 616. It is in effect approved by the earlier California case of Griffith *vs.* Ins. Co., 101 Cal., 627.

Also by the supreme court of Texas in the case of Mullen *vs.* Mutual Life Ins. Co., *supra*, from the opinion in which case the following quotation is taken:

"In construing this statute the courts of New York have held that no forfeiture of a life-insurance policy can occur unless the notice provided for in the statute has been given, and that the burden of showing such notice is on the insurance company, and that the insured is not considered in default of payment until at least thirty days after such notice is given, and although the insured may in fact have failed to make any number of payments, he must not be regarded, in the light of the statute, as in default or as having failed to meet his obligation until thirty days after such notice is given. Viewed in the light of this construction, which this court must accept, it would seem that the plaintiff in error only alleged in his petition what was legally true, and only what was necessary to show a rightful recovery. While it is true that he failed to pay two of the matured premiums before his wife's death, yet in the absence of notice such failure had no effect upon his legal rights in the premises, and did not constitute a breach of his obligation to pay premiums."

The supreme court of Michigan, in the case of Warner *vs.* National Life Association, *supra*, adopts the doctrine of the Baxter case upon this point.

By these decisions the law is firmly established that the duration and validity of the Sears policy was not dependent upon the payment of the premium annually on May 18, but upon the payment within thirty days after the mailing of the statutory notice, and that the condition upon which the policy could be forfeited or in any way impaired as a subsisting contract of insurance was the failure of Sears to pay the premium within thirty days after notice, and it appearing by the case made that no such notice was ever given, therefore no default occurred, and the insurance was valid and subsisting at the time of the death of Sears unless a case of equitable estoppel against his executrix is made out by the answer; so that at the time (whenever it was) that the company's agent approached Sears, as alleged in the affirmative answer, Sears was possessed of a valid subsisting policy of insurance. He was not in default. He had fully performed all the conditions of the contract which the law required him to perform. It was not at that time in the power of the company to terminate that contract. It could at the next ensuing due date after that conversation give the statutory notice, but the statutory notice would not have terminated the contract unless Sears failed to pay the required premium within thirty days after the mailing of that notice. If this conversation occurred in 1897, the situation was not different than if the conversation had occurred between, say, June 1, 1892, and January 1, 1893. If it had occurred during the last-named period it would have occurred at the time when Sears was not in default, because he had paid the premium covering to May 18, 1893. If it occurred during the first-named period he was not in default, although he had not paid any premium subsequent to that paid in 1892. In the brief filed in support of the petition for a writ of certiorari

it is stated as a fact, as well as by way of argument, that the transaction set forth in the affirmative answer was an agreement between Sears and the company, represented by the agent, that the policy should terminate. The allegations of the affirmative answer do not support such a statement or argument; but if it were otherwise, it is respectfully submitted that the agreement to terminate was *nudum pactum* for want of a consideration. Let us suppose that such an agreement might have been entered into during the last of the above-named periods. At that time Sears had a valid subsisting policy, for which he had paid the current premium, covering and extending beyond the time of the agreement. The agent came to him, and they agreed that the insurance should terminate. What consideration would there be to support the agreement? If Sears had died the day following it, would it be contended that his executrix could not have enforced the policy? The same conclusion must follow if the agreement took place during the first-named period, say during 1894 or subsequently, when a premium or premiums had been passed without payment; nevertheless the policy was a valid and subsisting contract. It was a valuable property right. There was no debt owing from Sears to the company for two reasons:

1st. The obligation to pay the annual premiums is not an enforcible demand in favor of the insurance company (Goodwin *vs.* Mass. Life Ins. Co., 73 N. Y., 480); and 2d, if it were, it was not yet due or payable, and Sears was not in default in the payment of it, and could not be until the expiration of 30 days after statutory notice.

This point has been expressly so decided by the circuit court of appeals of the ninth circuit in the case of Mutual Life Ins. Co. *vs.* Dingley (not yet reported), above referred to, from the manuscript opinion of the court, in which case we take the following:

"It is contended that the court erred in sustaining the demurrer to the affirmative matter of the answer, which alleged that the insured informed the insurance company that he recognized the contracts of insurance were lapsed, and that he had refused to continue his policies, and that it was then mutually agreed between the contracting parties that the policies were lapsed and terminated. It is not asserted that the contracts of insurance were declared forfeited by an instrument under seal, or that any consideration passed to the insured for the cancellation thereof. The matters so pleaded evidently rested in parol."

Nothing can be treated as a consideration that is not intended as such by the parties.

Fire Ins. Ass'n *vs.* Wickham, 141 U. S., 564.

So that if the matter rested solely upon such an agreement, it follows that the policy was subsisting and enforcible at the time of Sears' death. It is a fair test of this proposition to suppose the case to be that the agent came to Sears and he and Sears agreed together that the insurance was at an end, no consideration passed, and the policy itself was not surrendered. If Sears' death had occurred immediately, would not the policy have been subsisting and enforcible, notwithstanding the agreement? The answer must be yes. Therefore if enforcible then, it would be enforcible the next day, or the next week, or the next year, *unless something intervened which would supply the place of a consideration.* It is claimed on behalf of the plaintiff in error that that something did intervene and it was an estoppel, to wit, that, relying upon what took place between the agent and Sears at that time (whenever it was), the company withheld a statutory notice or notices. There are several complete answers to this claim.

FIRST.

It does not follow that if the company had not withheld the notice, but had given it, the policy would not have been still in force at the time of Sears' death; for if subsequently a statutory notice had been given, the notice itself would not have terminated the policy. Sears would have still had the right to comply with the terms of the notice. Upon receipt of such a notice he might have changed his mind from the intention he had expressed to the agent and have paid the premium. The position of the company was not changed to its injury, for the same result is reached by the judgment in this case (by way of deduction of passed premiums with interest) as might have followed the giving of the notice had the company not relied upon the statement made by Sears to the agent. The petitioner, by its plea of estoppel, in effect says: If Mr. Sears had not made this statement to our agent, we possibly would have given a statutory notice at the next or some subsequent due date (if one occurred prior to the death), and Mr. Sears would not have complied with it, because he said that he would not, and *if* Mr. Sears had not made the statement to our agent, and *if* he should not have paid, the policy would have been terminated; therefore Mrs. Sears is estopped to deny that the policy is terminated.

There are too many "ifs" in the proposition to constitute a good estoppel, and this brings us logically to the second answer.

SECOND.

But before discussing the second reason the attention of the court should be called back *to the record*, for we have in the discussion of the first reason been following counsel for the plaintiff in error outside of the record and considering the effect of an *agreement* between Sears and the

company's agent. There was no such agreement. We repeat here the allegations of the answer:

"VI. That subsequent to the failure of the said Stephen P. Sears to make payment of the said annual premium falling due on said policy May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after the said Stephen P. Sears was fully informed and knew that said policy had been by it declared lapsed and void for nonpayment of premium, this defendant, through its agents, applied to said Stephen P. Sears to make restoration of said policy by making payment of said defaulted premium and having the said policy restored to force, but that said Stephen P. Sears refused to make such payment and refused longer to continue said policy or make any further payments thereon, and then and there elected to have the same terminated, and this defendant, relying upon the said election and determination of said Stephen P. Sears, at all times subsequent thereto treated said policy as lapsed, abandoned and terminated, and relying upon the said conduct of said Sears abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof."

It is seen from the foregoing that all that was done was: The agent called upon Sears and asked him to make restoration of the policy by paying a defaulted premium; but Sears refused to make *such payment*, and refused longer to continue said policy or make any further payments thereon, and elected to have the same terminated. Relying thereon, the defendant treated the policy as lapsed, abandoned, and terminated, and, relying thereon, abstained from giving a statutory notice or notices. The fact that the company subsequently treated the policy as lapsed would not tend to an estoppel unless, so treating the policy, a future notice or notices were withheld. In [illegible] particular manner the company looked at the policy or treated it would be immaterial, unless the company abstained from taking some step by way of statutory notice which it otherwise would have taken.

So far as what was said and done related to the past or the present, all of the generally enumerated elements of estoppel are missing. They are said to be six in number:

1. There must be conduct amounting to a representation or concealment of material facts.

2. These facts must be known to the estopped at the time, or knowledge thereof imputed to him.

3. The truth concerning these facts must be unknown to the other party at the time of the conduct and at the time of the action upon it by him.

4. The conduct must be done or representation made with the intention or at least expectation that it will be relied upon and acted upon by the other party.

5. The conduct must be relied upon by the other party.

6. Relying upon it, he must have acted upon it in such manner as to change his position for the worse.

Bigelow on Estoppel (5th ed.), p. 568.

Viewing the affirmative matter of the answer in view of these essentials of an estoppel in their order, we come first to—

First Essential.

It certainly cannot be said that there was any act, language, or silence by or on the part of *Sears* amounting to a misrepresentation or concealment of any fact. All that Sears is alleged to have said or done is, to wit: He knew that the company had declared the policy lapsed for nonpayment of premium. He refused to make the requested payment. He refused longer to continue the policy by making further payments. He elected to have the policy

terminated. There is nothing here constituting either misrepresentation or concealment.

Henshaw *vs.* Bissell, 18 Wall., 255–272.
Davis *vs.* Davis, 26 Cal., 23–40.
Tyler *vs.* Odd Fellows, *infra.*
Baals *vs.* Stewart, 109 Ind., 371, 378.

Second and Third Essentials.

No past or present fact is referred to except the previous declaration by the company of the lapsing of the policy for non-payment of premium. It is clear, upon the face of the statement, that this fact, if known to Sears, was also certainly known to the company.

Davis *vs.* Davis, *supra.*
Henshaw *vs.* Bissell, *supra.*
Strong *vs.* Ellsworth, 26 Vt., 366, 374.
Buck *vs.* Milford, 90 Ind., 291, 293.
Whittaker *vs.* Williams, 20 Conn., 98–104.
Greensburgh Co. *vs.* Sidener, 40 Ind., 424–435.
Welsh *vs.* Cooley, 44 Minn., 446.
Brant *vs.* Va. Coal & Iron Co., 93 U. S., 326–337.
Steel *vs.* Smelting Co., 106 U. S., 47.

Fourth Essential.

It is not alleged that what Mr. Sears did and said was done with the intention or expectation that the company would take or refrain from any action in reliance upon it. Sears had at the time a subsisting policy. The company's agent came to him asking him to restore the policy to force by paying the premium. The company knew, if the agent did not, that the policy was then in force, was not lapsed, was subsisting, and did not require restoration. The company sent its agent to Mr. Sears to represent to him the con-

trary, to mislead Mr. Sears as to his rights. The misrepresentation, if any, was made by the company, through its agent, and not by Sears. Therein lies the only representation which was made by either party as to facts past or present. It was not Sears who represented that the policy was lapsed, but the company, through its agent, made the representation to Sears and, making it, demanded or requested a payment of money which Sears was under no obligation to pay at that time. Sears refused to pay the money. In so doing he was well within his rights.

1st. The money was not yet due, he was not in default in respect of it, and could not be put in default for a period of time thereafter not less, in any event, than 30 days.

2d. There is no suggestion in the pleading that the agent presented or had with him the official receipt which alone, under the policy, would authorize the agent to accept the payment or authorize Sears to pay it to the agent. (See policy, Record, p. 6.)

But the answer negatives the existence of any intention on the part of Sears to induce the company to take or refrain from any act, especially any act in relation to such statutory notices. It is alleged that the company had previously, as a matter of fact, "declared the policy lapsed," of which Sears had been previously advised. It is alleged in paragraph V of the affirmative matter, on page 17, that the company had declared the policy lapsed, and so entered it upon its books and records. The case made does not show when this took place, save that it occurred after May 18, 1893, and prior to the death of Sears. The only information which this court has as to when this declaration and book entry took place is that the insurance company states to the court in its petition for certiorari (page 7) that "upon default in the payment of the second

annual premium the policy was entered upon the books of your petitioner as lapsed and forfeited." How could it be true, then, that Mr. Sears could have intended to mislead the company or could have intended or imagined that what he said to the agent would result in the company's withholding a future statutory notice or notices, when the company was at the same time declaring to him, by its agent, that the company had already terminated the policy and the policy was lapsed and void? The conversation did not have reference to the termination or forfeiture of a *live* contract. It related only to the restoration of an alleged *terminated* contract. Therefore it is impossible that Mr. Sears could have intended by what he said to cause the company to take any course of conduct looking to the future termination or forfeiture of the contract, or that anything he said would affect the withholding of a statutory notice or notices in the future to terminate a contract which the company had already declared terminated, and so informed him. Nothing was said or done (we gather from the answer) in relation to the future termination of that policy. No reference was made in the conversation to the giving of statutory notice, past or future; but if such an intention could by the most violent inference be imputed to him, how could it operate to mislead the company, which had already taken the position that the policy was terminated, and had so written it upon its books?

"It is difficult to see where the doctrine of estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud, and, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will

not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud.' 1 Story's Eq., 391. To the same purport is the language of the adjudged cases. Thus it is said by the supreme court of Pennsylvania, that 'the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up.'"

Brant *vs.* Virginia Coal Co., 93 U. S., 326, 335–'6.

"Equitable estoppels are as binding upon parties and privies as legal estoppels, and are as effectual in courts of law as in equity. The act or assertion must be willful, with intent to deceive the other party. Parties are only estopped from denying their own acts when the denial operates to the injury of another, and when such expressions are expressly designed to and do influence the conduct of such person. 'An admission by the defendant intended to influence the conduct of the man with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction, is the very definition of an estoppel *in pais*.'"

2 Herman on Estoppel, sec. 787.

"In order to create an estoppel *in pais*, or equitable estoppel, as defined and established by the law at the present time, there must be an admission intended to influence the conduct of the man with whom the party is dealing, and actually leading him into a line of conduct prejudicial to his interest, unless the party estopped be cut off from the power of retraction."

Ibid., sec. 792.

"An estoppel results from conduct which was intended to induce, and has induced, another to act to his disadvantage.

It can only come from a successful effort to get one to change his situation."

Tyler *vs.* Odd Fellows, 145 Mass., 134, 138.

"Applying this doctrine to the facts disclosed in this case, it will be seen that there is no evidence that the defendant, at the time he made the statements which it is insisted that he is concluded from denying, had any knowledge that the plaintiff intended to act upon the statements made in purchasing the note, or otherwise changing his position in regard to it. There is nothing in the evidence inconsistent with a belief on the part of the defendant, at the time he made the alleged statements in regard to the validity of the note, that the plaintiff was then the owner of it, or was acting as agent to obtain information for the assignees of the payees of it. The proof therefore entirely fails to establish the important element of knowledge and intent, on the part of the defendant, that the representation was to be acted on by the plaintiff. Estoppels are not favored in law, and everything necessary to establish them must be strictly made out in evidence."

Andrews *vs.* Lyons, 11 Allen, 349, 351.

"In this position thus established, it must be observed, that several things are essential to be made out in order to the operation of the rule: the first is, that the act or declaration of the person must be wilful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must, at least, it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation be untrue; and the other must appear to have changed his position by reason of such inducement."

Copeland *vs.* Copeland, 28 Maine, 525, 540.

"Before it can be claimed that a party shall not be permitted to falsify even his own declaration, act, or omission, it must be shown that he thereby intentionally and deliberately led the other party to believe a particular thing true, and to act upon such belief (Civil Code, sec. 765, subd. 4).

And his answer to a pleading in a case must show that such was the fact."

Page *vs.* Smith, 13 Oregon, 410, 414.

Ins. Co. *vs.* Norris, 31 N. J. Eq., 583.
Ins. Co. *vs.* Mowry, 96 U. S., 544–547.
Henshaw *vs.* Bissell, 18 Wall., 271.
Long *vs.* Anderson, 62 Ind., 537–543.
Colter *vs.* Calloway, 68 Ind., 219.

Furthermore—

"The representation must have been a free, voluntary act, and if obtained by the party who has acted upon it, it must have been obtained without artifice. If it has been procured by duress or by fraud, there will be no estoppel upon the party making it, it would seem, though he made it with the full intention that it should be acted upon. Indeed, it is said that where the conduct supposed to have created an estoppel was brought about or directly encouraged by the party alleging the estoppel, none is created."

Bigelow on Estoppel (fifth ed.), 583.

Fifth and Sixth Essentials.

From what has been said, it is very apparent that there is no allegation in the pleading to the effect that the company relied on any statement of Mr. Sears, and, thus relying, acted differently from what it otherwise would have; that, relying on any such statement, it changed its position for the worse. It is not alleged that had it not been for the alleged statement of Mr. Sears it would have sent the statutory notice; in fact, its pleading shows just the contrary. It had already declared the policy forfeited. It had assumed the right to declare the policy forfeited without sending the notice, and, thus relying on its knowledge of the law of the contract and the facts, it had previously declared the policy forfeited, and so entered it upon its books. More than that, it is alleged that the company so informed Mr. Sears, which was tantamount to saying to him: We know our rights

under the contract. We have exercised them. The policy i dead. Nothing you may say or do will influence us to question a forfeiture already occurred and so entered upon our books As to that, our rights are fixed, but you may pay the premium if you will do so at once. Up to the time of the alleged interview, which it now appears was subsequent to the time it had declared the policy lapsed and forfeited, it had so acted upon its own construction of the contract. Who misled it in the first instance? Certainly not Sears. There was no subsequent change in the company's position for the worse. None is alleged. Did the company, when it approached Mr. Sears, proceed on the theory that it was in doubt about the validity of its previous declaration of forfeiture and sought the interview to set that doubt at rest? If it had a different object and it was seeking to get such statement upon which to predicate an estoppel, it should have so informed Mr. Sears. To do otherwise would have been to obtain such statement from him for that use by a trick or by deceit, which would kill the estoppel (Bigelow, *supra*, p. 583).

It is true the answer alleges that "relying on the conduct of said Sears, it abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof," but it signally failed to allege that had it not been for such statement it would have acted in a different manner. More than that, the answer shows that it had already declared the policy forfeited and so entered it upon its books without serving a statutory notice. It had already assumed the position of forfeiting the policy without serving the notice. That position it maintained before the alleged interview with Mr. Sears, at said interview and ever since, and it even yet insists upon it. Then how can it successfully say that it withheld statutory notice in reliance on Mr. Sears' statements? It had refrained from giving a previous statutory

notice or notices. It so refrained before the interview with Sears, and after the interview it possibly still refrained.

A recent case from Massachusetts is directly in point. In that case a party insured his life in the Odd Fellows' Relief Association. By the contract he had power to designate at any time prior to death the person to whom the money should be paid at his death, so long as the person designated should be "an heir or member of the decedent's family," and not otherwise; and in case of no designation, the whole should be payable to his surviving widow for the use of herself and minor children, and if no widow should survive, then the amount should be paid to a guardian or trustee for said minor children. The insured had designated that $1,500 should be paid to his sister and $500 to his minor child. It was held that the designation of the sister was invalid because she was not a member of his family. The other facts and the law applicable fully appears from the following extracts from the opinion of the court:

"But the defendant contends that the plaintiff's right to recover the balance has been barred by the acts of his guardian. This claim suggests two questions: Is the plaintiff concluded by a written contract? Is he barred by an estoppel *in pais?* His guardian, Reuben Waterman, acting under an appointment in Connecticut, had an interview with the president of the defendant corporation, in which he informed him that he thought the plaintiff was entitled to $2,000. The president did not dispute that he was entitled to $500, but claimed the balance as belonging to Emily Jane Cook. It is fairly to be inferred from the report, that Waterman yielded readily to said claim, believing it to be well founded. There is nothing to indicate that he made any further assertion of his right, or that there was any controversy between the parties. Thereupon he was paid $500, and he signed, as guardian, a receipt for said sum containing these words: 'Which I hereby acknowledge to be in full of all demands or claims against said association which I now hold or to which I may be entitled as the assignee of L. E. Tyler, now deceased, and who was a member in class C in said association at the time of his death.'

Without considering whether a Connecticut guardian could bind his ward by a contract relating to property here, and assuming this to be in form a contract, and not a mere admission, we are of opinion that there was no consideration for an agreement not to claim the balance of the $2,000 to which the plaintiff was entitled. * * *

"It remains to inquire whether the plaintiff is estopped by the conduct of his guardian from maintaining this bill. It appears that, when Waterman received the $500, he understood that the defendant association would pay the remaining $1,500 to Mrs. Cook, and he made no objection thereto. An estoppel results from conduct which was intended to induce, and has induced, another to act to his disadvantage. It can only come from a successful effort to get one to change his situation (Plumer *vs.* Lord, 9 Allen, 455; Andrews *vs.* Lyons, 11 Allen, 349; Turner *vs.* Coffin, 12 Allen, 401; Carroll *vs.* Manchester and Lawrence Railroad, 111 Mass., 1). The act of the association by which its situation was changed to its detriment, and which is relied on as a foundation for an estoppel, was the payment of $1,500 to Emily Jane Cook. It does not appear that Waterman had a willful design to induce this act. On the other hand, the corporation seems to have proposed, and Waterman to have merely accepted, the payment to himself. It prepared a writing and sent it to him for his signature. He signed and returned it, and the draft was then sent him by mail. He passively assented to the arrangement which the corporation suggested. There is nothing to indicate that he received the plaintiff's money, and signed the receipt, with a view thereby to induce the making of a payment to said Cook. He seems rather to have understood that the corporation had decided for itself its action with reference to her, as well as to himself, and to have had no purpose, beyond getting what he supposed belonged to his ward. If the plaintiff could have been estopped by conduct of his guardian in a transaction of this kind outside of the State of his appointment, which we do not intimate, an essential element of estoppel was wanting, and this defense cannot prevail."

Tyler *vs.* Odd Fellows, 145 Mass., 134, 137, 138.

"The acts or declarations must have influenced the conduct of the other party to his injury. An estoppel can never arise by implication alone, except by some conduct which

induces action in reliance upon it to an extent which renders it fraud to recede from what the party has been induced to expect (Security Co. *vs.* Fay, 22 Mich., 467; 7 Am. Rep., 670). An equitable estoppel is only called into existence for the prevention of wrong and redress of injury. There must be some element of wrong in the action of the party creating it. He must know or have sufficient reason to believe that another party will place himself in a different position or subject himself to additional injury in consequence of the action or representation. * * * His action is to be referred to the contract, his motive to the necessity of making the proofs as a preliminary to securing the insurance. After he was requested to make the proofs he had agreed to make he made them, but the statement that he was induced to make them by the request is only a *post hoc ergo propter hoc.*"

Wheaton *vs.* Ins. Co., 76 Cal., 415, 432.

To work an estoppel the party sought to be estopped must have so conducted himself that a reasonably prudent man would believe that it was meant that he should act upon it.

Piper *vs.* Gilmore, 49 Me., 149, 154.

THIRD.

The foregoing discussion takes out of the case made any element of a misrepresentation relating to conditions, present or past; but it will be argued on behalf of the plaintiff in error that Sears is alleged to have made certain representations as to the future, and that such representations as to the future are found in his refusal to longer continue the policy or make any further payments on it, and that he then and there elected to have the same terminated.

Bigelow in his work on Estoppel (*supra*, p. 574) thus speaks of this branch of the subject:

"The representation of concealment must, also, in all ordinary cases, have reference to a present or past state of things; for if a party make a representation concerning something in the future, it must be shown by either a mere

statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract."

The doctrine is thus stated in 2 Herman on Estoppel and Res Adjudicata, page 902, section 778:

"An estoppel from the representations of a party can seldom arise, except where the representation relates to a matter or fact, to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances, of which either party can have no certain knowledge."

The case made at bar is a strong illustration of this author's text. The refusal of Sears to pay future premiums made at a time when he was not in default in respect thereto was but the expression of his then intention or present opinion, liable to modification or change upon a change of his circumstances, in regard to which neither party could at that time have any certain knowledge.

The author (Herman) goes on to say:

"The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act."

Sears had at that time an existing right, to wit, the subsisting contract of insurance. It will be claimed that his refusal to pay future premiums bore relation to an intended abandonment by him of that existing right. If so, is the allegation of the answer sufficient to show that this representation of his present or future intention to abandon that existing right was made by him to influence the petitioner, and that by it the petitioner was induced to refrain from subsequently giving the statutory notice? If so, does it

sufficiently appear that detriment resulted to the petitioner therefrom?

The doctrine of Herman's text is taken from the decision of this court in the case of Insurance Co. *vs.* Mowry, 96 U. S., 544–547. This court in that case uses the language which Herman has taken as his text (above quoted) and proceeds as follows:

"The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party, who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, *designedly* (italics are ours) induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his right against his declared intention of abandonment."

The supreme court of Pennsylvania in Stayton *vs.* Graham, 139 Pa. St., 1; S. C., 21 Atl. Repr., 2, says of this branch of the doctrine of estoppel:

"The doctrine of estoppel is applied to prevent statements of intended abandonment of existing rights from operating as a fraud upon a party who has been led to rely on them and thereby *change his conduct* and alter his condition."

The supreme court of Massachusetts had the question before them in the case of Langdon *vs.* Doud, 10 Allen, 433, wherein the holder of a promissory note sought to avoid the plea of the statute of limitations interposed by the defendant by allegation and proof that the defendant told the plaintiff he was going to California, never to return. He went to California, but returned. The plaintiff offered evidence to show that he was induced by the defendant's statement to believe that the defendant never would return, and therefore did not bring any suit in Massachusetts in his absence, believing that he intended to reside in California,

and that if he should happen to return, the time of his absence would be deducted from the statutory bar. The court, in discussing the alleged estoppel, say:

"A person cannot be bound by any rule of morality or good faith not to change his intention, nor can he be precluded from showing such change merely because he has previously represented that his intentions were once different from those which he eventually executed. The doctrine of estoppel or exclusion of evidence on the ground that it is contrary to a previous statement of a party, does not apply to such a representation. The reason on which the doctrine rests is that it would operate as a fraud if a party was allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and to alter his condition to his prejudice on the faith of such previous statement. But the reason wholly fails when the representation relates only to a present intention or purpose of a party, because being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action. There is another decisive objection to the application of the rule in question to the case at bar. The jury have found that the alleged statement or representation made by the defendant to the plaintiff was not made for the purpose of deceiving the plaintiff nor inducing him to believe that he intended to take up a permanant residence in another State. This special finding seems to be in accordance with the evidence as stated in the exceptions and the nature of the statement itself. There is wanting, therefore, an essential element without which the rule contended for by the plaintiff cannot be applied in any case; that is, that the defendant intended, when he made the alleged representation, that the plaintiff should act on the faith of it."

The same court, in the later case of Anderson *vs.* Lyons, 11 Allen, 349, states:

"The modern doctrine on this subject of estoppels *in pais* is thus stated by Lord Campbell in Howard *vs.* Hudson, 2 El. & Bl., 10: 'If a party willfully makes a representation to another, meaning it to be acted upon, and it is so acted

upon, that gives rise to what is called an estoppel. It is not quite properly so called; but it operates as a bar to receiving evidence contrary to that representation, as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth, must show that there was a willful intent to make him act on the faith of the representation, and that he did so act.'"

The supreme court of Massachusetts then proceeds as follows:

"Applying this doctrine to the facts disclosed in this case, it will be seen that there is no evidence that the defendant at the time he made the statements, which it is insisted that he is concluded from denying, had any knowledge that the plaintiff intended to act upon the statements made in purchasing the note or otherwise changing his position in regard to it. * * * The proof, therefore, entirely fails to establish the important element of knowledge and intent, on the part of the defendant, that the representation was to be acted on by the plaintiff. Estoppels are not favored in law, and everything necessary to establish them must be strictly made out in evidence."

The court in the last case was dealing with a representation of a fact—*i. e.*, a thing which had happened.

In Powell *vs.* Rogers, 105 Ill., 318, Powell commenced an action to foreclose a mechanic's lien, making Mrs. Rogers, who had a mortgage upon the property, a party defendant. He obtained a decree and bid the property in at sheriff's sale. He went to Mrs. Rogers and offered her his certificate of purchase for $50. She declined to purchase it or redeem from the sale, and stated to him that she would do nothing more about the matter. He then made expensive improvements on the property. Thereafter she filed a petition to vacate the decree and was successful. Rogers then filed an amended or supplemental petition to foreclose his lien, set-

ting up the facts aforesaid as an estoppel. Of these facts the supreme court on appeal say:

"We see nothing in this evidence to create an estoppel *in pais*. No fraud was shown on her part, nor was there any deception. The fact that in 1874 she declined to buy the certificate of purchase or redeem from the sale, and said she should do nothing more about the matter, could not in any manner deceive appellants, nor do we believe that such conduct or declarations induced them to do anything in reference to the property that they otherwise would not have done. * * * From the facts, the only reasonable conclusions is that appellants erected the house relying upon the validity of the title they had acquired rather than upon anything said or done by Mrs. Rogers, and if such was the case, they cannot claim or rely upon the doctrine of estoppel."

In Commonwealth *vs.* Moltz, 10 Pa. St., 527, a ward gave a receipt in full to her guardian. He died, leaving that receipt among his papers, whence it came into the hands of his administrators. The administrators settled his estate and distributed it among his heirs without requiring refunding bonds, as they might have done. The ward knew that they were distributing the estate. She afterwards sued them to recover a sum unaccounted for to her by her guardian, their intestate. The administrators claimed an estoppel from these facts:

"They claimed to have relied on this silence and the receipt of the ward in neglecting or declining to take refunding bonds from the distributees; but of this there is no proof beyond their assertion. * * * To the constitution of this species of estoppel at least three ingredients seem to be necessary—first, misrepresentation, or wilful silence by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done, and, thirdly, that injury would ensue from a permission to allege the truth. *And these three things must appear affirmatively.*"

Mr. Justice Cowen, in Dezell *vs.* Odell, 2 Hill, 219, defines an estoppel *in pais* to be "an admission intended to influence the conduct of the man with whom the party is dealing, actually leading him into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of detraction."

The supreme court of Pennsylvania, in the recent case of Stewart *vs.* Parnell, 147 Pa. St., 523, says:

"It is of the essence of an estoppel *in pais* that the party alleging it must have been induced to act upon a misrepresentation or concealment, and his action must have been of a character to result in substantial prejudice were he not permitted to rely on the estoppel."

The rule announced by Coke, that "every estoppel must be certain to every intent, and not to be taken by argument or inference," holds good today, and is especially applicable to the *pleading* of an estoppel, so that an estoppel must be pleaded with certainty and definiteness, so as to leave nothing to inference or implication.

A settled rule of pleading is that estoppels must be specially pleaded with great particularity and precision, leaving nothing to intendment.

Sims *vs.* City of Frankfort, 79 Ind., 446–452.
Bigelow on Estoppel, *supra*, 699.
Lorentz *vs.* Lorentz, 14 W. Va., 809, 821.*
Vanbiber *vs.* Beirne, 6 W. Va., 169, 178.
Andrews *vs.* Lyons, *supra*.

This rule requiring certainty should be applied most strictly to the case of an estoppel arising from a representation as to a present or future abandonment of an existing right. It is respectfully submitted that the plea under consideration does not come up to the requirement of certainty, and for that reason the action of the circuit court in

sustaining a demurrer to it was rightly affirmed by the circuit court of appeals.

What has been hereinbefore said in relation to the facts is more forcibly applicable here. The company refrained from giving notices before Sears stated his intended abandonment of his existing right. It pursued the same conduct thereafter. It had refrained before, it may have refrained afterwards. It certainly did not change its conduct. It is not alleged that but for the statement it would have adopted a new line of conduct and given a statutory notice. It does not appear that Sears at the time intended or expected or had any reason to expect or suppose that what he was saying would influence the company to adopt or change any line of policy or would even be taken into consideration by the company in shaping its policy. It does not appear (it could not) but that if thereafter a statutory notice had been given Sears might have changed his mind and made the payment.

"A party setting up an esotppel must always show as an essential part of his case that he will be subjected to loss if he cannot set up the estoppel. There is no presumption in his favor. * * * The whole office of an estoppel is to protect from otherwise inevitable loss." Bank *vs.* Todd, 47 Conn., 190–218.

The company had already declared the policy forfeited; had so written it upon its books. Its action showed it did not consider the sending of a notice necessary, alike before and after the statement. The statement had no relation to the giving of the statutory notice. The matter of the statutory notice was not the subject of the conversation. Nothing was said in the conversation to indicate that the company had any intention of giving the statutory notice at any time, or that it had ever had such intention or purpose. The company, by its agent, approached Mr. Sears, not in relation to terminating the policy, but of revivifying it. The

company spoke of it as a dead contract, and so represented it to Sears. It would be straining the pleading to gather from it, even by implication or argumentatively, that the statement was made by Sears with the intention of inducing the company to withhold future efforts to terminate the contract, or that any future action would or could in the nature of things be taken or withheld by the company in reliance upon his refusal to make future payments.

FOURTH.

It is not alleged that the company refrained from any particular act—simply that it refrained from all acts. The only act from which it could have refrained after Sears' statement of intended abandonment was the mailing of the statutory notice, for it could terminate the insurance in no other way. At any rate, it could terminate the insurance in no other way by its own act alone. Therefore the question is to be tested by considering whether or not because of Sears' statement it withheld a statutory notice, and this brings into prominence the point of time when the statement was made. As has been before stated, if the death of Sears had followed immediately upon the statement no notice could have been mailed, and therefore the element of prejudice to the company would be missing, and there could be no estoppel. The New York statute limited the occasion upon which such a notice could be given with the effect provided by the statute. Under the act of 1877 the notice might follow the due date and be given at any time. If the notice was given in advance of the due date it could be given on one occasion only each year, to wit, at least 30 days and not more than 60 days prior (in the case at bar) to May 18. Under the act of 1892 it could not be given after the due date, but only prior thereto, and then not more than 45 nor less than 15 days prior. So that *under the act of 1892* there was a period of 30 days during each year when the notice could be given.

If this statement was made by Sears after May 3, 1897, no action could be taken or withheld by the company on account of it until between April 3 and May 3, 1898; but Sears died in March, 1898, and therefore, if the statement was made by Sears at any time after May 3, 1898, the company could not, in the nature of things, be said to have withheld the statutory notice on account of it, because Sears' death, intervening before the arrival of the next occasion when the statutory notice could have been given, renders it an impossibility that the company's position could have been changed to its prejudice because of the statement.

Under the act of 1877, if the company had availed itself of the right given by statute to give the notice on account of a past default, the notice could have been mailed at any time up to the day of the death of Sears, but if it had been mailed within thirty days prior to the day of his death the policy would, at the time of his death, have been a subsisting contract, because he would have had, under the statute, all of those thirty days in which to pay the premium, so that if the statement of intended abandonment was made by Sears at any time within the thirty days preceding his death, then in such event the company could not have been prejudiced by refraining from a notice in reliance upon his statement.

So that under either statute there was a period of time within the allegations of the pleading during which the statement of Sears of his intended abandonment might have been made without prejudice to the company, and the time of the making of the statement of intended abandonment may have been so placed that the company cannot be heard to say that because of it it refrained from giving a notice, because the giving of the notice, if the company had given it, would not have of itself had the result of terminating the contract. If, then, the allegations of the answer are such that they may all be true and yet the result claimed

could not possibly have happened, the defense was vulnerable to the demurrer.

The allegation fixed the time of the making of this statement by Sears at no particular date, but confined it between May 18, 1893, and the day of the death of Sears, which occurred March 30, 1898. In this period of time between May 18, 1893, and March 30, 1898, there is a line of demarcation on one side of which the event may have occurred (the statement of intended abandonment made) without any of the consequences which the plaintiff in error would attach thereto. The placing of the time of the event on the one side or the other of this line of demarcation was material, because if placed upon one side the defense must fall, regardless of every contention which can be advanced in support of it. The plaintiff could admit (as the demurrer admitted) every allegation contained in the affirmative defense, and yet the answer would not have constituted a defense, because, for anything that appears to the contrary, the event did happen on the prohibited side of the line.

The law supposes that every suitor will state his case as strongly as the facts warrant, and hence the rule that a pleading is taken most strongly against the party making it.

Green *vs.* Covillaud, 10 Cal., 317, 323.

If all that is set up in an answer may be true and yet the plaintiff be entitled to recover, a demurrer is properly sustained thereto. If the answer is evasive as to a particular time, place, or circumstance, the exact time or place of which is essential, it is insufficient to constitute a defense.

City of Covington *vs.* Powell, 2 Mete. (Ky.), 226.

In order for this plea of estoppel to be sustained (assuming, for the sake of the argument, that it is otherwise good), it is necessary to suppose that Sears' statement was made more than a certain length of time before his death, therefore the plea rests for its validity upon a supposed state of

facts which may not exist, and this court has held that "a plea cannot be sustained which rests for its validity upon a supposed state of facts which may not exist."

Lyons *vs.* Burtram, 20 Howard, 149.
Bartemeyer *vs.* Iowa, 18 Wall., 129–134.

Baylies, in his work on Code Pleading and Forms, section 12, thus states the rule under consideration:

"Under the Code, if the time when a fact happened is material to constitute a defense, it must be stated, and a failure to state it renders the pleadings demurrable."

To the same effect is—

Tullock *vs.* Webster County, 46 Neb., 211; 64 N. W., 705.
Lockwood *vs.* Bigelow, 11 Minn. Reps., 113, *70.
Balch *vs.* Wilson, 25 Minn., 299.

Certain it is that no intendments are indulged in favor of the plea of estoppel, and the allegations thereof should especially be subject to the rule construing a pleading most strongly against the pleader.

To establish an estoppel the facts which are supposed to call for its application must be unquestionable and the wrong which is to be prevented be undoubted.

Maxwell *vs.* Bridge Co., 46 Mich., 278.

Estoppels never arise from ambiguous facts. They must be established by those which are unequivocal and not susceptible of two constructions.

Fredenburg *vs.* Church, 37 Mich., 476.

FIFTH.

The defense of estoppel is not permissible under the statute. The statute reads:

"No insurance company shall have power to declare lapsed or forfeited any policy of insurance hereafter issued or renewed, except as hereinafter provided."

There is no attempt to maintain that the policy was forfeited in the manner provided in the statute. There is no claim that the defense shows as a fact that the policy was forfeited; but the defense is that Mrs. Sears is estopped to claim that it was not forfeited. The position of plaintiff in error is this: that while the statute does not permit it to declare a forfeiture except by showing compliance with the statute, yet it may defend on the ground that a forfeiture has been declared and in fact occurred, notwithstanding the statute.

We maintain that the statute should be construed as though it contained these further words: "Nor shall any company defend in any court of law or equity on the ground that any policy is lapsed or forfeited unless it shows compliance with this act as hereinafter provided." It would be idle to say an insurance company shall not declare a policy forfeited for non-payment of premiums except in a certain way, and yet permit it to make a defense of forfeiture for non-payment of premium on other and prohibited grounds, such as the company is attempting to make in this case.

The statute then proceeds to lay down a rule as to how and when the forfeiture may be declared. "When any premium or interest due upon such policy shall remain unpaid, a *written* or *printed* notice," etc., shall be served. Does not that exclude *oral* notice? When the statute says no policy shall be declared lapsed *except as herein provided*, would it be competent for an insurance company to say, we gave the

notice required by the statute, except our notice was given orally by an agent? Surely not in the face of a statute which requires such notice to be in writing. The supreme court of Connecticut, in speaking of the claim made by a party to a suit on an insurance contract that an oral consent was equivalent to consent in writing, the statute requiring that it should be in writing, says:

"The evil could not be successfully reached by merely requiring the *consent* of the company to such further insurance. There would be no security from misunderstanding, misremembrance and fraud. The difference is great between leaving the consent of the company to be proved by the vagueness and uncertainty of parol evidence, and requiring it to be shown by a formal endorsement upon the policy under the hand of their secretary, which could not be made without consideration and deliberation on the one hand, and certainty of the fact on the other (Hale *vs.* Mechanics' Mut. Fire Ins. Co., 6 Gray, 169). * * * *We think therefore that the legislature had more than this in view, and intended to limit the power of the company in the matter. If then the twelfth section must have such construction, manifestly it could not be waived by the defendants,* or departed from in any essential particular. * * * We think, therefore, that it was not competent for the plaintiff to prove the consent of the defendants to the double insurance on the plaintiffs' property, by any other evidence than an indorsement of such consent on the policy under the hand of the secretary of the company: and that the jury should have been so instructed."

Couch *vs.* Ins. Co., 38 Conn., 181, 186, '87.

To the same point is the case cited from Massachusetts, where it was provided by the by-laws of a mutual insurance company that the president of the company could only consent to additional insurance by written endorsement. By a statute it was provided that the corporation could only alter the by-laws at a regularly called meeting by two-thirds of the members present voting for the proposed amendment.

It was claimed that a verbal consent was sufficient. The court uses this language:

"By article fifteenth of the by-laws, his power to assent to subsequent insurance was expressly confined to giving such assent in writing. In order to guard against the danger of over-insurance, the corporation might well require that any assent on their part to further insurance on property insured by them should be given by the deliberate and well-considered act of their president in writing, and not be left to the vagueness and uncertainty of parol proof. The whole extent and limit of the president's authority in this respect were set forth in the by-laws attached to the policy in the present case, and, as the evidence shows, were fully known to the assured (Worcester Bank *vs.* Hartford Fire Ins. Co., 11 Cush., 265; Lee *vs.* Howard Fire Ins. Co., 3 Gray, 589, 594)."

Hale *vs.* Ins. Co., 6 Gray, 169, 173.

This is especially the rule in cases where the statute as a matter of public policy requires a thing to be done in a specified way.

The statute also provides:

"Such notice shall further state that unless the said premium or installment then due shall be paid to the company or its duly authorized agent or other person authorized to collect said premium, within thirty days after the service of the notice, the said policy and all payments thereon will become forfeited and void."

It has been held that this is essential to a valid notice. It cannot be omitted, nor can an insurance company substitute for such language any other which it may equivalent in meaning. In the case of Phelan *vs.* Insurance Company, 113 N. Y., 147, the company sent a communication to the insured as follows:

"The 4 qr. premium of $17.40 on your policy, No. 102,320, falls due at the office of the agent of this company in New York city, N. Y., before noon on the 31st day of December, 1882. The conditions of your policy are that payments must

be made on or before the day the premium is due, and members neglecting so to pay are carrying their own risk. Agents have no right to waive forfeitures. Please present this notice at time of payment.

"Yours respectfully, J. W. SKINNER, *Secretary.*

"Prompt payment is necessary to keep your policy in force."

The company claimed that this was equivalent to the statutory notice. The court held:

"There is no pretense that this notice (meaning the statutory) was given; but, on the contrary, the argument of the defendant is to the effect that it did another thing which the statute makes equivalent thereto. As to that the provision is that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner 'above stated,' at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the notice before provided for. That such notice had been given was a fact to be established by the defendant before its defense could be maintained, and whether it was so established is the only question on this appeal.

"We are also of opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event 'a policy will become forfeited and void,' conveys a meaning easily to be comprehended. To refer to the policy and conditions and say that 'members neglecting so to pay are carrying their own risk,' is quite another thing; and while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology, it is not the language of the statute and does not embody the notice which the statute requires. The principle upon which our decision in the recent case of Carter *vs.* Brooklyn Life Insurance Company (110 N. Y., 15) rests applies and requires that the appeal should succeed."

Phelan *vs.* Ins. Co., 113 N. Y., 147, 150, 151, 152.

So it is not enough that the insurance company serve a written or printed notice, but it must conform in language to the statute; and so knowledge of the due date is *not* enough, even though given the necessary thirty days by notice, if the notice does not conform to the language of the statute.

By serving the notice thus required, the company is made to say and admit to the insured, "Your policy is alive. You can pay the premium within thirty days." What was the position assumed by the company in this case, as indicated by its affirmative defense? Instead of thus admitting the policy was alive by serving the notice, it orally notified and asserted to Mr. Sears that his policy was forfeited. Instead of notifying him in writing, "Your policy will be forfeited and void if you do not pay your premium within thirty days," it informed him orally that it was already forfeited and requested immediate payment as a condition of *restoration*. This is not only an entire failure on the part of the company to conform to the statute, but is in direct violation of it, both in letter and in spirit.

The statute further provides:

"In case payment demanded by such notice shall be made within 30 days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to payment of said premium or interest, anything therein contained to the contrary notwithstanding."

The allegations of the plaintiff in error show that not only did it fail to comply with the statute as above suggested in many respects, any one of which is fatal to its defense, but that its demand was for an immediate payment of the premium, which was refused. It had no right to make such a demand in writing, much less orally. If it had otherwise complied with the statute the demand for payment in less than 30 days would have been fatal and rendered the action it took of no avail. In the case of Hicks *vs.* Ins. Co.,

60 Fed., 690 (C. C. A.), a notice in compliance with the statute in language had been served only 29 days prior to the date upon which payment was demanded. The court held that it was insufficient:

"The notice must state that unless the premium shall be paid within 30 days after the mailing of the notice, the policy will become void. The intention is obvious, from the language, that the person insured shall have 30 days within which to make payment and save forfeiture after the mailing of the notice. The policy cannot be forfeited 'until the expiration of 30 days after the mailing of such notice.' The proviso authorizing an advance notice to be given is not intended to curtail the privilege of the assured, but gives the insurance company the option of serving the notice with the same effect as though served subsequently to a default; but it provides that this notice shall be served at least 30, and not more than 60, days prior to the day when the premium is payable. * * * Excluding, as must be done according to the authorities, the day of mailing in the computation in the present case the notice was served by the defendant 29 days, and not 'at least 30,' prior to the time when it should have been in order to effectuate the forfeiture. The defendant is in no better position than it would be if no notice had been mailed."

Hicks *vs.* Ins. Co., 60 Fed., 690, 693.

"No proof was given of compliance with the statutory provision in regard to the mailing of the notice, but the argument of the respondent is that the regularity of its proceedings in those respects is to be inferred from the fact that the notice was found among the papers of the deceased. The evidence is insufficient for that deduction. * * * Nor does the fact that the notice was in the possession of the assured on the 17th of January, 1883, afford any ground for inference that he received it in due course of mail, nor that it was served upon him or received by him at any day earlier than January seventeenth."

Phelan *vs.* Ins. Co., 113 N. Y., 147, 151.

The demand of the company, if made, in this case was rightfully refused. Mr. Sears had full thirty days after the

service of the statutory notice to determine whether he would pay the premium. A demand for immediate payment was of no force. The company, if it made any such demand, well knew and was conclusively bound to know that it was of no force or effect. His refusal to pay, in so far as it affects the forfeiture provision under the statute, amounts to nothing. The only evidence permissible to prove non-payment or his inability or disinclination to pay would be his failure for thirty days after service of the notice to pay, after he had had the full thirty days in which to determine his course and to prepare to meet the payment, with the printed notice before him warning him of the penalty of his default. He might determine any day to pay, and any previous declaration to the contrary would not affect him or his right. It is not any declaration he may make in advance as to whether or not he will pay, but his failure to pay after being put in default according to the exclusive method provided by the statute, that determines his rights and fixes his status in reference to the forfeiture provision of the policy. Such a declaration made at any time before the service of the notice would have no more force to bind him than a statement to that effect made the day after the issuance of the policy. The company could no more successfully rely on the one than on the other.

The statute also required the notice to state to whom he should pay the premium, so that payment to that person should be a good payment. The person to whom payment might be made was left to the determination of the company, the only requirement being that he should be authorized and the insured be notified by the company that such party was authorized. The policy itself provides:

"All premiums are due and payable at the home office of the company in the city of New York; but will be accepted elsewhere, when duly made *in exchange for the company's receipt, signed by the president or secretary.*"

There is no claim that the agent had any such receipt with him or that the company had sent the statutory notice or any other notice to the effect that such agent was authorized to receive the premium. Then, to Mr. Sears such agent was a stranger. He had no right to accept his declarations or statements. He had no right to make payment to him, nor would he be able to rely on any statement made by such party. Especially is this true under another provision of the policy:

"Notice to the holder of this policy.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy."

See Record, pp. 8 and 9.

These provisions were inserted by the company for its benefit—for its protection. Such provisions have done it service in a hundred contests. Why should it repudiate them now? There is no pretense or claim in its pleadings that it gave such agent special written authority to make any such demand, or in effect to enter into such an alleged new contract, or that such agent, having such authority, communicated such fact to Mr. Sears, or that as a fact he had such authority.

We think no one can read the statute carefully, especially in light of the decisions upon it, or like statutes, but he will at once conclude that it was the intention of the legislature in enacting this law to establish by it a definite, fixed, and absolute rule for the forfeiture of insurance contracts; one that would be universal and not subject to be set aside; one that would enable the insurance company to enforce the forfeiture feature in entire accordance with the terms of the contract, making the method of service easy and proof of the service equally easy and simple. But, on the other hand, it made this method mandatory and exclusive. It took

great pains in framing the provisions of the act to guard against any possible evasion of any of the rights and privileges conferred upon the insured by the act: (*a*) The notice must be in writing, not oral; (*b*) it must name the amount of the premium and the date of its payment; (*c*) it must contain words of warning; (*d*) it must be addressed at the last known post-office address; (*e*) it must have the postage prepaid; (*f*) it must give imsured at least thirty days in which to prepare for and pay the premium. None of these things may be evaded. This notice may be served before or after due date named in the policy, but one or the other notice must be served; and—

"In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; *but no such policy shall in any case be forfeited* or *declared forfeited* or *lapsed* until the expiration of thirty days after the mailing of such notice." (See act.)

The necessity of compliance with the statute in all respects is well illustrated by the decision of Mr. Justice McKenna, when a member of the circuit court of appeals, in the case of Provident S. L. A. *vs.* Nixon, 73 Fed., 144, from which we quote:

"The statute is explicit as to when and where and how notice shall be sent to the assured that a premium is due. The provision and language is that it 'shall be duly addressed and mailed to the person whose life is assured * * * at his or her last-known post-office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium' (3 Rev. St. (8th ed.), 1686.) It is contended by plaintiff that his proof shows a compliance with the statute. It does not explicitly, but it is claimed as an inference from the word 'mailed;' and that this word implies prepayment of postage is said to be supported by the following cases:" * * *

"We should be disposed to follow these decisions if the witnesses of plaintiff in error had testified that they had mailed the notices, without adding explanations; certainly to the extent of holding that the testimony should have been submitted to the jury. It is true that William E. Stevens, secretary of the company, testifies that the notices were mailed; but this was hearsay, and properly excluded. The other two witnesses, Meeder and Prosser, testify as to the point involved, very much alike; and while each, in reply to the question if he had mailed the notices, answered "Yes," each enumerated what he did, and did not include in the enumeration payment of postage. To allow the testimony to be proof of the requirements of the statute would be to relax it too much, and afford opportunity for its evasion."

In the case at bar the company is defending, as a matter of fact, without pretense of having served the notice. What could the statute mean by the use of the words "but no such policy shall *in any case* be forfeited or declared forfeited," etc., if it had not in view a defense of the character here insisted upon? Did not the legislature intend to eliminate any defense of forfeiture except as provided by the act? From the evident intent of the legislators and their purpose in framing the act, can its language be construed to mean anything else? Does not the language itself exclude any other construction?

The statute which requires the insurance company to serve a specified printed notice instead of oral notice was formulated in part on the true theory that in most cases where controversies would arise over the forfeiture of insurance policies under it the insured would be dead. The notice would speak for itself, and would convey to the insured the information that the legislature thought he ought to have. The information would be full and complete and could not be misunderstood. If the insured did not act upon it, he would suffer the consequences of his own neglect. But if, on the other hand, it permitted an oral notice to be given or an oral waiver of the notice or per-

mitted alleged admissions of the insured to take the place of the written notice it would be giving an unfair and enormous advantage to the insurance company. The dead could not be called back to life to tell his side of the story. It would leave his representatives wholly at the mercy of the agent of the insurance company. There would be no way to meet such testimony. Every incentive would thus be given to relate only what was beneficial to the one party and conceal everything to the advantage of the other. To give one side such an advantage would be unfair, unjust. This statute, we maintain, is not susceptible of any such construction. In construing this statute it must be borne in mind all the while that its purpose is protection to the insured.

There is every reason for this rule that there is for that rule established by statute in nearly all States, that no party to an action against the representatives of a deceased party shall be permitted to testify as to what took place between the decedent and such party. All courts have upheld such statutes and enforced them rigorously, as strongly suppressive of fraud. If such a defense as this may be upheld, the statute is of very little consequence, and insurance companies whose agents are of easy conscience can always successfully defend, though they may have violated every essential feature of the statute. No court has so far sustained such a defense; on the contrary, the courts have held the companies to strict compliance.

IV.

Abandonment or Subsequent Waiver.

It may be claimed, however, that though the waiver in the policy is ineffectual and the facts pleaded are insufficient to constitute an estoppel *in pais*, nevertheless the facts pleaded are sufficient to show an abandonment or waiver.

Certainly it will not be claimed that the statement of Mr. Sears would constitute a waiver of future statutory notices. If the facts are insufficient to create an estoppel *in pais*, their insufficiency for the other purpose seems to follow. If it was incompetent for him in the policy in 1891 to waive the subsequent annual notices, certainly he could not by parol in 1893 or later year waive those yet to follow. If he could not on January 1, 1893, waive the notice of the premium of May 18, 1893, could he do so on May 19, 1893? The first-named date was in advance of the maturity of the premium, in advance of default. So was the latter, for under the statute and the decisions he had thirty days after notice in which to pay. If it was against the public policy of the statute that he should waive in advance, it is equally so at any time when he was not in default.

The only allegation in the answer which the plaintiff in error can claim to be a basis for a statement of abandonment is the refusal to pay passed premiums and future as well, and that he "then and there elected to have the same (meaning the policy) terminated." It is not alleged that he was at the time advised of his rights in the premises. On the contrary, it is alleged that the company represented to him that his policy was already lapsed, forfeited, and terminated.

"There is no question, of course, but that a court of equity cannot grant relief solely upon a mistake of law. But there was here more than a mistake. There was a surrender of legal rights intentionally induced and procured by a false representation as to the law governing the case. The defendant must be presumed to have known that it was liable for the whole loss and by falsely representing that under the law applicable to the case the policy was void, when in fact it was valid, it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject and to surrender to it his claim.

"This clearly constitutes fraud and there would be mani-

fest injustice in upholding a settlement under such circumstances."

Berry *vs.* Ins. Co., 132 N. Y., 49, on pp. 53–'4.

So that if he had said, "I hereby abandon my policy," there is no reason in law or morals why he should not be permitted to change his mind the next day and determine not to abandon.

The company would not be injured by the change. This shows that the abandonment or subsequent waiver proposition is but the estoppel *in pais* proposition under another name. Indeed, WAIVER AND ESTOPPEL AS APPLIED TO INSURANCE CONTRACTS ARE SYNONYMOUS TERMS.

This is recognized by courts and text writers.

Mr. Bacon, in his work on Insurance, states the proposition as follows:

"It will be seen from an examination of the cases cited in this chapter, as well as from the preceding sections, that if the words waiver and estoppel, as used in insurance cases, are not synonymous terms, the line of separation between them is so shadowy and uncertain that it cannot always be distinguished. * * * We shall not, therefore, in the succeeding pages attempt to distinguish between cases of waiver and those of estoppel, because if attempted it could not always be done. It will be readily seen that the same facts may be construed both to amount to the waiver of a right, otherwise enforceable, and to estop the party from asserting such right as a defense. What name to give to the legal effect of a certain condition of facts often depends upon the point of view from which such facts are regarded."

2 Bacon, Benefit Soc. & Life Ins., sec. 421, pp. 830, 831.

Mr. May's statement is in these words:

"The terms 'estoppel' and 'waiver,' though not technically identical, are so nearly allied, and, as applied in the law of insurance, so like in the consequences which follow their successful application, that they are used indiscriminately by the courts."

May on Insurance, vol. 2, 3d ed., sec. 505.

The supreme court of Michigan, in discussing the question of waiver as applied to an insurance contract, reaches the same conclusion in these words:

"The waiver that is spoken of in these cases is another term for an estoppel. It can never arise by implication alone, except from some conduct which induces action in reliance upon it to an extent that renders it a fraud to recede from what the party has been induced to expect. It is only enforced to prevent fraud."

Security Ins. Co. *vs.* Fay, 22 Mich., 466, 473.

The circuit court of appeals for the ninth circuit says:

"The plea of estoppel, as set forth in the third affirmative defense, is but another name for waiver. There is no question concerning the plea of estoppel that can be distinguished from the question as to the plea of waiver."

Ins. Co. *vs.* Hill, 97 Fed., 263, 270.

To the same effect is a decision of the supreme court of Illinois:

"Many of the cases cited by appellee's counsel recognize that a forfeiture may be waived by those who are held out as agents of insurance companies, but we do not consider it necessary to notice them further than to say that in none of them is the doctrine recognized that there is a waiver where there is neither a contract to that end, supported by a sufficient consideration, and having the other essential requisites to a legal contract, nor the necessary elements of a legal estoppel."

Society *vs.* Baldwin, 86 Ill., 479, 486.

Texas Banking Co. *vs.* Hutchins, 53 Tex., 61.

"A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such intent, and where it appears that there was no such intent in fact, and no understanding on the part of the insured that the proofs were waived, so that he was not misled, it will be held that there has been no waiver (Findeison *vs.* Metropole Fire Ins. Co., 57 Vt., 520). Both the assured and the underwriter must understand that there is a waiver of a

condition, in order to make it operative. The understanding of one party without sufficient cause given by the other, is not enough (Hambleton *vs.* Home Insurance Co., 6 Biss., 91, at 95)."

2 May on Insurance (third ed.), p. 1171, note to sec. 508.

A waiver "never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it. * * * There must be knowledge to establish a waiver."

Diehl *vs.* Ins. Co., 58 Pa. St., 443, 452.

No person can be said to have waived his rights unless he understands he is waiving them.

Kirby *vs.* Ins. Co., 13 Lea (Tenn.), 340–344.

In the case of Insurance Company *vs.* Nixon, 26 C. C. A., 620, it was claimed by the insurance company at the date one of the premiums became due, under the terms of the policy, the agent of the company called upon the duly authorized agent of the insured and the beneficiary, and, showing to him the official receipt for the premium, requested payment thereof. Thereupon the said agent refused to pay it, and stated that it was not the intention of the parties to keep up the insurance, but that they intended to let it go. It was claimed by the insurance company that this amounted to a waiver of the statutory notice and an abandonment of the contract by them. The court in answer to this claim said:

"There are several reasons why the court below was right in refusing to give this instruction. It will be sufficient to state one, and that is that the statute of the State of New York prescribes the condition upon which a policy may be forfeited for the non-payment of premium. The statute is mandatory and controls the contract. *Its provisions are not subject to be set aside or waived either by the company or the assured or by both together.*"

The same question came again before the court in the case of Insurance Co. *vs.* Trimble, *supra*, where the doctrine announced in the Nixon case was reaffirmed and approved.

To the same effect is a decision from the supreme court of Texas (89 Tex., 259):

"In construing this statute, the courts of New York have held that no forfeiture of a life-insurance policy can occur unless the notice provided for in the statute has been given, and that the burden of showing such notice is on the insurance company, and that the insured is not considered in default of payment until, at least, 30 days after such notice is given; and, although the insured may in fact have failed to make any number of payments, he cannot be regarded in the light of the statute as in default, or as having failed to meet his obligation, until 30 days after such notice is given."

Ins. Co. *vs.* Smith, 41 S. W., 680.
Hale *vs.* Ins. Co., 6 Gray, 169.
Quinn *vs.* Ins. Co., 71 Ia., 615.

V.

No Estoppel or Waiver Can be Predicated on Facts or Conduct in Violation of or Contrary to the Charter of the Company or the Laws Regulating Such Matters.

It may be admitted that parties to a contract may waive or be estopped from asserting any provision therein which is solely the creature of their contract. Such provisions they may change or modify at their pleasure; but where it is provided by the charter of a corporation or by general statute that a contract shall be made, altered, or terminated in specified way as a matter of public policy, neither party can set up as a defense by way of estoppel the conduct or statements of the other as a substitute for the method or rule prescribed by statute. This is a public

policy statute. The court of appeals of New York, in the case of Phelan *vs.* Insurance Company, has held that this is a statute creating a public policy.

"We are also of opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event 'a policy will become forfeited and void' conveys a meaning easily to be comprehended. To refer to the policy and conditions and say that 'members neglecting so to pay are carrying their own risk' is quite another thing, and while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology it is not the language of the statute and does not embody the notice which the statute requires."

Phelan *vs.* Ins. Co., 113 N. Y., 147, 150, 151-'2.

The same court in Merriman *vs.* Ins. Co., 138 N. Y., 116, terms it a statute of public policy.

The following authorities hold that it is a public policy statute:

Griffith *vs.* Ins. Co., 101 Cal., 627.
Mullen *vs.* Ins. Co., 89 Tex., 259.
Warner *vs.* Ins. Co., 100 Mich., 157.
Ins. Co. *vs.* Hill, 97 Fed., 263.
Ins. Co. *vs.* Nixon, 26 C. C. A., 620.

The following authorities support the proposition that such a statute is one of public policy:

Insurance Co. *vs.* Clements, 140 U. S., 226.
Insurance Co. *vs.* Ficklin, 74 Myd., 172.
Insurance Co. *vs.* Leslie, 47 Ohio St., 409.
Insurance Co. *vs.* Pollard, 94 Va., 146.
Hermany *vs.* Ins. Co., 151 Pa. St., 17.
White *vs.* Society, 163 Mass., 108.
Reilley *vs.* Ins. Co., 43 Wis., 449.
Chamberlain *vs.* Ins. Co., 55 N. H., 249.
Emery *vs.* Ins. Co., 52 Me., 322.

Then it is clear that the statute under consideration is declarative of a public policy.

The authorities hold that, such being the fact, the defense of a subsequent waiver or estoppel is no more effectual to annul and set aside the statute than the waiver incorporated in the policy.

A case from Indiana is in point. It was an action on a policy of insurance issued in Indiana by an insurance company chartered under the laws of Illinois, and by the terms of the policy the provisions of the company's charter were made a part of the policy. One section of the charter provided as follows:

"Said company may make insurance for any term not exceeding five years, * * * in all cases where the assured has a title in fee-simple, unencumbered, to the building or buildings insured and to the land covered by the same; but if the insured has a less estate therein, or if the premises be encumbered, the policy shall be void unless the true title of the assured, and the encumbrance on the premises be expressed therein."

The company alleged that at the time the policy was issued the premises insured were encumbered by certain judgments, which encumbrances were not expressed in the policy, and that the policy was void. It further alleged that the plaintiff made a written application for such insurance, and that in said application plaintiff represented that the property was free from encumbrances, whereas, in fact, they were encumbered by the lien of said judgments. The reply, to avoid the defense, as stated in the opinion, is as follows:

"In the second paragraph of his reply, the appellant admitted the encumbrances on the buildings insured and on the real estate whereon such buildings were situate, as the same were stated in the third paragraph of appellee's answer, except as to one of the judgments mentioned therein, but he averred that at the time the appellee took his application for the insurance of his property, described in such

application and in the policy in suit, and at the time of the issuing of such policy of insurance of the property insured, the appellee had full knowledge of all said encumbrances on the buildings insured, and on the real estate upon which such buildings were situate, such encumbrances, and each and all of them, having been fully explained and made known to the appellee by the appellant, at and before the time of his making the application for such insurance and before the issue of the policy in suit; and that the appellee, at and before the taking of appellant's application for such insurance, and at the time of issuing to him such policy of insurance, had full knowledge and information of the said condition of the title to such buildings insured, and to the real estate whereon the buildings were situate. And the appellant averred that at the time of his making the application for such insurance, and at the time of the issue to him of the policy in suit, the provisions and conditions of the charter, under which the appellee did business, were not made known to him; neither was such charter in any way made part of such application or policy, so that the appellant might know its provisions, and he never knew the provisions of such charter until after his barn was destroyed by fire, as alleged in his complaint. Wherefore the appellant said that the appellee was estopped from setting up any defense in this action on account of any of said encumbrances on the buildings insured or on the real estate upon which said buildings were situate, or on account of any defect in the appellant's title to such buildings and real estate."

Leonard *vs.* American Ins. Co., 97 Ind., 299, 302.

This defense of estoppel and waiver would have been good under all the authorities if the stipulation against the encumbrances had rested upon the agreement of the parties, but it, being imposed upon the policy by force of law, could not be waived, nor could the company estop itself by conduct to urge the violation thereof. The court holds in regard thereto as follows:

"A corporation, such as the appellee, can only transact its business through its officers or its agents. If the appellee itself, through its principal officers, upon the facts

stated in the third paragraph of its answer, could not make and issue a valid, legal and binding contract or policy of insurance, through an absolute want of corporate power so to do, it would seem to be clear that none of its subordinate agents or solicitors could, upon the same facts, make and issue a valid, legal and binding contract or policy of insurance; in other words, where the question is one of corporate power, if there can be no waiver by the corporation itself, acting directly through its principal officers, there certainly cannot be any waiver where the corporation is sought to be charged by and through the acts of its subordinate agents or solicitors. * * *

"It will be seen from our summary of the third paragraph of answer, that the defense therein stated is based upon the alleged fact that the appellee had no corporate power to make or issue the contract or policy of insurance, declared upon by the appellant in his complaint in this case. * * * In Phillips Insurance, p. 9, it is said, that an incorporated insurance company is 'the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.'

"Whenever the charter of an insurance company requires that any act shall be done, and prescribes the mode in which such act shall be done, and declares that if the act be not done in the manner prescribed, the contract or policy of insurance shall be void, the company cannot waive the performance of such act in the prescribed mode; *for performance of any condition of the contract, fixed by law, cannot be waived. This has been repeatedly declared to be the law in cases involving the question of double insurance.*"

In Head *vs.* Providence Ins. Co., 2 Cranch, 127–166, the charter of the company provided the method of effecting insurance to be by writing signed by an officer. The company defended an action on the policy on the ground that it had been canceled by subsequent agreement entered into on its part by an *unsigned* letter. Marshall, C. J., places the holding of the court, that the policy was still in force, upon

the want of power in the company to cancel otherwise than by a writing of like dignity, saying:

"It (the company) may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes."

The supreme court of Connecticut has adopted the same rule in the case of Couch *vs.* Insurance Company, 38 Conn., 181. The insurance company, a Connecticut corporation, insured property of one Couch; its charter contained the following provision:

"If there shall be any other insurance upon the whole or any part of the property insured by any policy issued by said company, during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said company, indorsed upon the policy under the hand of the secretary."

It was insisted that this provision of the contract (made so by force of the law) had been waived by the company in fact consenting, though failing to endorse its consent on the policy. The court said:

"There was such double insurance in this case at the time this policy was issued, and the consent of the company thereto was not indorsed upon the policy. The charter therefore declared the policy void, and it is void unless the twelfth section is of such a character that its provisions can be waived by the defendant.

"One great source of this evil is the insurance of the same property by different companies, when each company is not aware of the act of the other. To prevent this evil, as far as may be, in the present case, we think the legislature inserted the twelfth section in the defendants' charter, intending thereby to put it out of the power of the defendants to insure property otherwise than is provided therein.

"The evil could not be successfully reached by merely requiring the *consent* of the company to such further in-

surance. There would be no security from misunderstanding, misremembrance and fraud. The difference is great between leaving the consent of the company to be proved by the vagueness and uncertainty of parol evidence, and requiring it to be shown by a formal indorsement upon the policy under the hand of their secretary, which could not be made without consideration and deliberation on the one hand and certainty of the fact on the other (Hale *vs.* Mechanics' Mut. Fire Ins. Co., 6 Gray, 169).

"This difference is all-important in a case like this; and, indeed, if mere consent was all that the legislature intended by the twelfth section of this charter, then no object was accomplished, or could be accomplished, by inserting it in the charter; for if the defendants should make an absolute contract of insurance, without any condition that it should become void if there was or should be further insurance on the property by any other company, during the whole or any part of the time covered by the policy, they would be taken by jurors as having given consent in advance to such further insurance; or the mere fact of such absolute contract would be sufficient evidence with them of a waiver of the condition."

Couch *vs.* City Fire Ins. Co., 38 Conn., 181, 184–'6.

The supreme judicial court of Massachusetts holds directly in line with our contention in the case of Hale *vs.* Mechanics' Mutual Fire Insurance Company, 6 Gray, 169. One Hale took out a policy in a Massachusetts company whose by-laws contained the following provision:

"All policies which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues; and when a subsequent insurance shall be made by any other company, or by any person, on property insured at this office, without the consent of the president, in writing, and according to the terms in such consent expressed, it shall annul the said policy; and the assured shall be entitled to such return of premium and deposit as is provided in article 23d."

The company defended on the ground that the policy had become void by reason of the fact that subsequent to the issuance of the policy the insured had procured other insurance on the same property, and that the consent of the company to such further insurance had not been indorsed in writing on the first policy. The insured claimed and the jury found as a fact that at the time the subsequent policy was taken out, the insured procured the consent of the president to the further insurance and left the first policy with the president with his promise to indorse his consent in writing thereon, which he failed to do prior to the loss. The insured claimed by reason of these facts the company waived that provision of the policy and was estopped from making the defense that the consent to the subsequent insurance was not indorsed in writing on the policy by the president. In answer to this claim by the assured, this court says :

"Such being the rights of the parties under the contract, it is clear, upon the facts in this case, that the policy was annulled under the fifteenth article of the by-laws by reason of the subsequent insurance procured by Stone and Perry on the property without the assent of the president of the corporation in writing, unless the waiver of such written assent by the president and his verbal consent to such subsequent insurance, as found by the jury, operate to set aside this provision in the by-laws as to this particular policy and render the contract valid, notwithstanding by its express terms, as well as by the clause in the by-laws, it would be otherwise void. * * *

"Nor is this the only restriction on the power of the president. He had no authority to waive any by-law of this corporation. By Rev. Sts., c. 37, sec. 24, and c. 44, sec. 1, the corporation alone had power to establish by-laws 'for their own government, and for the due and orderly conducting of their affairs.' By article twenty-sixth it is expressly provided, that the by-laws 'shall in no case be altered' unless previous notice of such intended alteration be given as therein prescribed, and 'it shall be voted for by two-thirds of all the members present at that meeting.' If

the argument of the plaintiff should be carried out to its legitimate result, it would give to the president the right, in any case, to suspend or change the by-laws by his verbal act and at his pleasure. This he clearly had no power to do."

Hale *vs.* Ins. Co., 6 Gray, 169, 173, '4.

See also—

Priest *vs.* Ins. Co., 3 Allen, 602.
Evans *vs.* Ins. Co., 9 Allen, 329.
McCoy *vs.* Ins. Co., 152 Mass., 272.
Blanchard *vs.* Ins. Co., 33 N. H., 9.
Fayban *vs.* Ins. Co., 33 N. H., 203.
Simpson *vs.* Ins. Co., 38 P. St., 250.

To the same effect is a decision of the supreme court of Wisconsin, 55 Wisconsin, 543, in the case of Luthe *vs.* Farmers' Mut. Fire Ins. Co.:

"The policy was written on the building as a dwelling, and the answer in effect charges that such building was afterwards converted into a school-house, and at the time of its loss by fire it had become and was a school-house, and was used and occupied as such. The prohibition of town insurance companies by sec. 10, ch. 103, Laws of 1872, and sec. 1931, R. S., from insuring buildings of this character without a majority vote of its members, is clear and explicit. It is not contended that if the policy had been written upon a school-house it would have been valid, nor, as we understand the brief of the respondent's counsel, that if the dwelling insured had been converted into a school-house proper that the policy would not thereby have become void. A policy of this company without such vote cannot lie and subsist on a school-house. That a policy of insurance on a dwelling, which was afterwards, during the life of the policy, converted into a school-house, would thereby become void, is clearly within the reason of the legislative prohibition. Such a prohibited policy is *ultra vires*, and becomes so whenever the building falls clearly within the prohibited class of buildings which are not allowed by law to be insured by such a company, whether at the date of the policy or afterwards. *The doctrine of consent and waiver is not applicable to*

such a case, because the law makes the restriction of power, and not a mere regulation of the company."

The distinction between cases like the foregoing and those in which the restriction is only a matter of agreement between the parties is pointed out by the same court in the case of Morrison *vs.* Ins. Co., 59 Wis., 162.

"There is nothing in the charter of the company which restricts membership therein, or in any of its classes, to persons of any particular age. It was competent for the company to admit persons as old as Mr. Morrison in class 'E.' Having that power, it could waive in his favor the restriction of the by-law in that behalf. In this respect the case differs from that of Luthe *vs.* Farmers' M. F. Ins. Co., 55 Wis., 543, wherein it was sought to apply the doctrine of consent and waiver to an act which was prohibited by the charter of the company, and which the company had no power to authorize. It was held that there could be no waiver of a forfeiture in such a case. Had the charter of the present defendant restricted membership therein to persons under fifty years of age, we should have a case like Luthe *vs.* Farmers' M. F. Ins. Co. Were such the case the company could not waive the forfeiture. But we are dealing with no such case."

Morrison *vs.* Ins. Co., 59 Wis., 162, 169.

A case from Iowa is also in point. By the act of the legislature of Iowa, in 1880, chapter 211, Miller's Code of Iowa, 1880, p. 299, it was provided—

"That no action shall be begun within ninety days after notice of such loss has been given. All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

The action was brought within the prohibited period. The lower court instructed the jury that—

"If a company has absolutely refused to pay a loss, and informs a policy-holder that it will stand a suit, and will

not pay, or the like, then the law does not require a need less delay, and the policy-holder may at once sue, if it is perfectly clear that the company does not intend to pay and proposes to contest. *Held:* It will be observed that the statute is clear and explicit, and contains no exception whatever, and yet the instruction grafts on or injects into it a very important exception or qualification; and, in so doing, we think the court erred. In a statutory sense, the money was not due on the policy until the expiration of the period named therein. The holder of the policy could not lawfully demand payment until that time had elapsed after the notice had been given. If the maker of a promissory note not due should positively declare and state that he would not pay it when due, this would not authorize the holder to bring an action on it prior to the maturity of the note. The same rule must prevail in the present case. The defendant might conclude to pay, but whether it did or not is immaterial, for the reason that the loss was not due and payable to the plaintiff until the expiration of ninety days after the notice of the loss was given, and therefore the court erred in giving the foregoing instruction."

Quinn *vs.* Capital Ins. Co., 71 Ia., 615, 616.

In this case, as we have shown, when the petitioner asked the respondent to restore the policy by paying up, he could under his contract, as modified by the statute, rightfully refuse. It was not due and would not become due under the law of New York until thirty days after the service of the statutory notice. The company could not legally enforce the payment under penalty of forfeiture until the end of the thirty days after the service of the notice. To adapt the language of the last above-quoted case, the insured "might conclude to pay, but whether it (he) did or did not is immaterial for the reason that the loss (premium) was not due and payable to the plaintiff (plaintiff in error) until the expiration of ninety (thirty) days."

See also Gibbs *vs.* Ins. Co., 9 Daly, 203.

There is another class of cases wherein the doctrine of estoppel or waiver has been urged, and where the courts

have uniformly held that it could not be maintained because contrary to statute or public policy. The first we will notice is from the supreme court of Arkansas (37 Ark., 551). By the law of that State a mortgage of a homestead was void:

"Appellant insists that the clause in the mortgage copied in this opinion estops appellees from claiming any of the aforedescribed lots as a homestead. Has it that effect? We think not. The constitution of 1868, which was in force at the time of the execution of the mortgage, expressly declares that 'the homestead of any resident of this State, who is a married man or head of a family, shall not be encumbered *in any manner* while owned by him,' except with liens for taxes, and with laborers', mechanics' and vendors' liens. Lots four, five and six were the homestead of appellees at the time of the execution of the mortgage sued on; and the mortgage, if anything, was an effort to encumber the homestead, and is in that respect void because it violated the constitution of 1868.

"The fact that any of these lots were or were not the homestead of appellees depended not upon any recitals, statements, stipulations or covenants contained in the mortgage. The actual use and occupation as a home and residence constituted the homestead, and could only be shown by extrinsic evidence. To assert and maintain the right of homestead the appellees must necessarily be permitted to plead and prove this fact. This follows as an inseparable and necessary incident to the rights of homestead guaranteed to them by the constitution. *Any recitals, statements, stipulations or covenants incorporated in the mortgage to prevent the pleading or proving this fact, or having that effect, if any, according to the legal construction thereof, were in violation of the constitution in force at the time of its execution and against its policy, and are void.*"

Webb *vs.* Davis, 37 Ark., 551, 554, 555.

The supreme court of Massachusetts recognizes this distinction:

"The demandant, by her deed, made in her husband's lifetime, undertook to convey to Herbert N. Mason, a son of her husband, and one of the devisees under his will subse-

quently made, all right, title, and interest which she then had or might thereafter have in her husband's estate, expressly referring to her right of dower therein. It is the contention of the tenants, that, under the present existing right of married women to hold, manage, and dispose of their separate property in the same manner as if they were sole, the demandant is now estopped from making demand for dower, or from asserting any interest in the husband's land." * * *

"Nor, while she alone is entitled thereto, is it that separate property which, during coverture, she may manage or dispose of at pleasure, as distinct from that of the husband. The Pub. Sts., c. 124, sec. 6, and c. 147, sec. 16, carefully provide for certain modes by which a woman may bar her right of dower in the estate of her husband during his lifetime. They are by release, which is only to be made to him who holds the estate in which the right might otherwise be asserted. These modes we must hold to be exclusive. * * *

"The instrument signed by the demandant, whether considered as a conveyance or as a contract, is therefore void at law. *If such be the case, it cannot operate against the demandant by way of estoppel in equity. A court of equity cannot take jurisdiction to recognize and give effect to instruments which, under the statute law, are inoperative.*"

Mason *vs.* Mason, 140 Mass., 63–65.

So in this case the company asserts that the policy of insurance was forfeited for the non-payment of premiums, and that Mrs. Sears is estopped to maintain that it is not, notwithstanding that it was not forfeited in the mode or manner prescribed by the statute, though the statute says that "no insurance company shall have the power to declare lapsed or forfeited any policy except in the manner hereinafter provided," and "that no policy shall be forfeited or declared lapsed or forfeited until thirty days after the service of the notice." In the case cited the statutory mode of obtaining release of dower was not followed, though by writing the wife for a consideration purported to sell and re-

lease her dower interest—a thing which it was possible for her to do provided she complied with the statute. She did not comply with the statute; hence no conduct, statement, or contract to that effect could work an estoppel. In the case at bar the policy, as a fact, was not forfeited, nor could the company legally declare it forfeited; but it claims that we are estopped to deny a forfeiture. We claim that the statute under consideration, like the statute of Massachusetts, prescribed the exclusive method of forfeiting the contract, and for the same reasons no estoppel can exist.

Another case from Massachusetts is in point:

"The St. of 1818, c. 105, in relation to the Indians and other persons, proprietors and residents on the plantations of Marshpee and Herring Pond, defined what persons should be considered proprietors; and also enacted that the real estate held by them, as such proprietors, might be disposed of by deed or will (secs. 1, 5). By the St. of 1834, c. 166, sec. 9, establishing the district of Marshpee, it was provided that, upon the death of any proprietor without descendants, all his interest in the lands of the district should escheat to the proprietary, and that any proprietor of land in severalty might devise or sell the same to any other proprietor. The power of a proprietor, in conveying land held in severalty, was thus limited, and he had no authority to convey to a person who was not a proprietor."

One Mercy McGrego, an Indian, sold and attempted to convey property owned by her to an Indian named Jesse Webquish, who was not a "proprietor" at the time of the attempted sale, but subsequently became such. It was held that the deed was void, and that her heirs were not estopped to show that the deed was void. The court said:

"The deed, therefore, of Mercy McGrego to Jesse Webquish, who was not a proprietor, made after the passage of the St. of 1834, was in contravention of law and void. She was incapable of making such a contract, and its execution could not affect her interest in the estate, or the interest of her descendants, who, by virtue of the descent from her, be-

came proprietors, as provided in the St. of 1818, c. 105, sec. 1. Nor did the deed take effect and operate as a conveyance when Jesse Webquish was admitted as a proprietor in 1842, under the St. of 1842, c. 72, which provided that persons having certain qualifications could be admitted as proprietors. The deed being absolutely void, and the title remaining in Mercy McGrego, *neither she nor her descendants were estopped from setting up title in the land, as against Jesse Webquish, although he afterwards became a proprietor; for the doctrine of estoppel has no application to the case of a party incapable by law of making a contract. For the same reason, the St. of 1869, c. 463, removing all disabilities from Indians, cannot affect this conveyance.*"

Pells *vs.* Webquish, 129 Mass., 469, 471–472.

To the same effect is a decision of the supreme court of Minnesota:

"This brings us to the conveyance of July 30, 1870, from Hart to Pritchard. Under the decision of this court in Dickinson *vs.* Kinney, 5 Minn., 332 (409), which, so far as we are aware, has never been disturbed, Hart, by his purchase at his execution sale, took all the estate of Randall (found by the referee to be the fee) in the premises in controversy, subject only to the rights of redemptioners. This estate the county did not acquire by the transaction between it and Hart, for want of capacity. We are unable to see how that transaction could operate in any way to protect the lien of the county's judgment, or to prevent Hart from asserting the estate which he acquired by his purchase. If it could have such operation at all, it must be by an estoppel *in pais*. There is no basis for such estoppel, for both Hart and the county are to be taken to have known exactly what the legal effect of the transaction was. There could, then, be no estoppel *in pais*, within the doctrine of Commissioners of Hennepin County *vs.* Robinson, 16 Minn., 381, or within the definition given in Pence *vs.* Arbuckle, 22 Minn., 420, where it is said that 'an estoppel *in pais* arises when one, by his acts or representations, or by his silence when he ought to speak out, intentionally, or through culpable negligence, induces another to believe certain facts to exist, and such other rightfully acts on the belief so induced, in such manner that if the former be permitted to deny the existence of

such facts, it will prejudice the latter.' (See also Plummer *vs.* Mold, 22 Minn., 15; Shillock *vs.* Gilbert, 23 Minn., 386.)" James *vs.* Wilder, 25 Minn., 305, 312.

To the same effect are—

Merrill *vs.* Monticello, 138 U. S., 673, 694.
Anthony *vs.* Jasper County, 101 U. S., 693.
Harrington *vs.* Stone, 39 Kansas, 176.

VI.

Tender of Passed Premiums Prior to Commencement of Action Was Unnecessary.

1.

It is admitted that the contract was made and the first premium thereon paid, and that the contract was in all respects valid. The contract having once been made, the same could not be forfeited except in the manner prescribed by the statute. The premiums were not due until thirty days after the service of the statutory notice. The insured fully complied with his contract when he paid such premium after the service of the statutory notice. The statutory notice was not served; consequently no second premium ever became due. Hence the insured fully complied with all the conditions of the contract. *There is no condition in the policy requiring the executrix to pay unpaid premiums, but, on the contrary, the policy provides that the company may retain unpaid portion of premiums when it pays the policy.* The above has been fully sustained by every court that has been called upon to pass on the question. The first court that was called to pass on the question was the appellate court of New York. The pleadings were practically identical with the pleadings in this case. In fact we followed that decision, believing that any court that would be called upon to

construe the statute of New York would follow the decision of the highest court of that State, and, more than that, we believe it to be good law.

"*It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the twenty-fourth of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured or her assignee, except to present to the defendant the proofs of death required by the policy.* The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the person entitled to the benefits of the policy had only to establish the facts of death within the time and in the manner prescribed therein. The contract was kept in life by force of the statute, until the contingency upon which payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This put the defendant in precisely the same position in which it would have been if the premium had been duly paid (Carter *vs.* John Hancock M. Life Ins. Co., *supra*).

"It was conceded upon the argument in this case that the unpaid premium, and interest thereon was deducted from the verdict, and thus no injustice has been done.

"The judgment should be affirmed."

Baxter *vs.* Insurance Co., 119 N. Y., 450, on p. 453–'7.

In a still later case this decision was upheld by the same court in which all the justices concurred. The following quotation states the necessary facts:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged

and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frece *vs.* Insurance Co., 136 N. Y., 144, on p. 151.

It is so held by the supreme court of California.

Osborne *vs.* Ins. Co., *supra.*

2.

No tender was necessary, because the company had denied all liability on the contract.

The company, having taken that attitude, cannot claim that we ought to pay a premium on a policy that it had already repudiated as forfeited and void. Does the company mean to say now that it was not acting in good faith; that it was trying to mislead us, and that it would have taken the premiums? Surely it cannot take such a position, and if it did this court would not permit it. It is an old maxim of the law that no court will compel a party to do an utterly useless act. The company took the position that the original contract had ceased to exist and that there was no contract. We had a right to and did assume and believe that such was its ground of defense.

The supreme court of Washington, in a case exactly identical with this—Griesemer *vs.* The Mutual Life Insurance Company of New York (this same plaintiff in error)—has held the foregoing to be the law. The opinion, by Mr. Justice Hoyt, is as follows:

"The appellant alleges one other reason for the reversal of the judgment, which it is necessary for us to consider. It was not made to appear from the record that there had ever been any tender of the premium which became due before the death of the assured. And it is contended that, since the payment of the premium was a condition precedent to the policy being kept in force, no action could be maintained

thereon until such condition had been complied with by some one claiming under the policy. This contention is found upon the well-settled legal proposition that an action cannot be maintained upon a contract by one party unless he has complied, or offered to comply, with all the conditions on his part to be performed. There is, however, a well-settled exception to this rule, when it relates to the question of tender of money, and that is that whenever it clearly appears that the tender, if made, would not have been accepted, the contract may be enforced without such tender. And in our opinion the question of tender in the case at bar was within this exception. It appears from the notice sent by the company upon the receipt of proofs of death, that the company entered upon the investigation of the rights of the claimant under the policy and held that they were terminated by the non-payment of the premium. And we think that enough appears to show that the company elected to stand upon the forfeiture growing out of such non-payment, and would have refused any tender of such premium. Especially is this true in view of the fact that they went on to determine the cash value of the policy at the time of the default in the payment of premium. This action of the company, construed in connection with the clause in the policy which provides that from the amount due upon it shall first be taken any sum due to the company, sufficiently shows that the money would have been refused if properly tendered. Hence the action can be maintained without such tender having been made."

Greisemer *vs.* Mutual Life Insurance Co., 10 Wash., 202, on p. 210.

Griesemer, adm'x, *vs.* Mutual Life Insurance Co., 10 Wash., 212.

Sanford *vs.* Ins. Co., 11 Wash., 653–666.

It is thus seen that the highest courts, both of Washington and New York, have held that a tender of premium was entirely unnecessary. Defendant in error, living in the State of Washington, had a right to rely on these authorities as establishing the law of the case and upon which she could rest with absolute confidence, one being the law

of the place of contract, the other the law of the forum. The plaintiff in error was familiar with these decisions when she commenced this action. No court will tell her she was in error in relying upon them confidently as settling the question. Would it not be doing her a great wrong and injustice to dismiss her action and compel her to tender a premium on a contract that the company has repudiated, and that, too, contrary to the laws of the place of contract and the forum as well? Further than this the decisions of both States are in entire harmony with numerous other courts, and among them the following: United States *vs.* Peck, 102 U. S., 64; Equitable Insurance Co. *vs.* Wining, 7 C. C. A., 359; Insurance Co. *vs.* Smith, 5 N. E., 417 (Ohio State).

VII.

It is contended on behalf of the plaintiff in error that even if the New York statute is a part of the policy in suit, nevertheless the New York statute is not to be considered because it is not pleaded. The argument is put in this way: That the suit is upon the policy only, and for the defendant in error to call into action the New York statute in aid of her demurrer is to introduce a departure in the pleadings.

The argument of plaintiff in error upon this point is based upon the decision of the Supreme Court of the United States in the case of Union Pacific Railway Co. *vs.* Wyler, 158 U. S., 285, in which Wyler commenced an action in the *State court* of Missouri, alleging that while at work for the railway company in Kansas he had suffered a personal injury through the negligence of the company in employing an incompetent fellow-servant with previous knowledge of his incompetency. The complaint contained no allegation of negligence on the part of the fellow-servant, but was confined, as above stated, to an allegation that the negligence

was that of the company in employing an incompetent fellow-servant. There was in force at the time a Kansas statute making every railroad company liable for damages done an employé in consequence of any negligence of its agents or by any mismanagement of its engineers or other employés. The case was removed to the circuit court of the United States for the western district of Missouri, where an amended complaint was filed which eliminated the charge of incompetency on the part of the fellow-servant and the averment of knowledge of such incompetency on the part of the railway company, and in which the plaintiff rested the cause of action exclusively upon the negligence of the fellow-servant, averring that the company was liable therefor by virtue of the provisions of the Kansas statute. The amended complaint was filed more than five years after the happening of the accident. To the amended petition the company pleaded the statute of limitations of Missouri, which bars actions for personal injuries after five years. The question before the court was whether the amended petition set up a different cause of action than that alleged in the original petition, for if it did the commencement of the new action was to be regarded as dating from the filing of the amended petition, and therefore the bar of the statute would apply.

The inapplicability of the principles announced by the Supreme Court of the United States in this case can be best pointed out if we test the Missouri case by the case at bar.

If the Missouri case had been brought originally in the Federal court, as was this case, and the original complaint had alleged that the injury was caused the plaintiff while working for the railway company in Kansas by the negligence of the fellow-servant, it is entirely clear not only that the case would have been decided otherwise if the question was raised, but also that such a question would never have been raised in the case. In the case at bar the plaintiff states the

making of the contract of insurance, the payment of the first premium, and the terms of the application upon which it is based, to wit, that the application is made under the charter of the company and the laws of the State of New York; and the further fact that the policy expressly provided that the application should be deemed a part thereof and of the contract of insurance. The allegation of these facts brought into the case the statute of New York. The statute was a public statute of said State, and there is at this day no question but that the Federal court, sitting in Washington, takes judicial notice of the public laws of New York without averment or proof thereof, and that it is not only unnecessary, but poor practice to set out any such public statute in a pleading. Having pleaded a contract of which the general laws of the State of New York were made a part by the terms of the contract, either party to the action was at liberty to claim upon demurrer, or at any other stage in the case, or by any other method, the benefit of any New York statute which was to his advantage. The circuit court of appeals for the ninth circuit has previously recognized this long-standing rule in the case of Merchants' Bank *vs.* McGraw, 59 Fed., 972–977; 8 C. C. A., 420, from which the following quotation is taken:

"The allegation of the complaint that the plaintiff was incorporated was denied in the answer. The plaintiff offered in evidence a certificate of incorporation, and undertook to prove the competency and sufficiency of the same by reference to the statutes of Wisconsin, but by oversight referred to the wrong section of the statutes. The reference was intended to be section 2024, which provides that a certificate, such as that offered in evidence, shall constitute due proof of incorporation. It is sufficient to say in answer to this that it was not necessary to introduce proof of the statutes of Wisconsin. The courts of the United States take judicial notice of all public statutes of the several States of the Union."

Again, the Supreme Court of the United States in the case of Gormley *vs.* Bunyan, 138 U. S., 623, uses this language:

"With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only to be said that the courts of the United States take judicial notice of all public statutes of the several States."

The case of Junction Railroad Company *vs.* Ashland Bank, 12 Wall., 226 (in error to the U. S. circuit court of Indiana), is particularly in point. In that case there was a New York contract, as in the case at bar, yet the court says:

"With regard to the question what law is to decide whether a contract is or is not usurious, the general rule is the law of the place where the money is payable; although it is also held that the parties may stipulate in accordance with the law of the place where the contract was made. In this case it is conceded by all the pleas, and shown by the special finding of the court, that the place of the payment of the bonds in question was the city of New York. By the law of that State, passed April 6th, 1850, of which the circuit court had a right to take judicial notice, no corporation is allowed to interpose the defense of usury. None of the special pleas allege that the place of payment mentioned in the bonds was adopted as a shift or device to avoid the statute of usury. The device complained of was a pretended sale of the bonds, when the transaction was really a loan. Admitting that it was a loan, it is not denied that it was made *bona fide* payable in New York, hence the pleas cannot stand as pleas of usury properly so called. They must stand, if at all, on the allegation that one or both of the contracting parties was prohibited by the law from making such a contract."

To the same effect is the decision of the circuit court in the case of L'Engle *vs.* Gates, 74 Fed. Rep., 513:

"The Federal courts take judicial notice of the laws of all States, *and it is only necessary that the pleadings show a state of facts to which any statute will apply*, and the statute will be taken into consideration *without averment* or proof."

The pleading was the same in the Baxter case, *supra*, as in the case at bar. The plaintiff introduced in evidence the policy and rested. It was held upon full discussion that the pleading and proof was sufficient to make out a *prima facie* case, which could be overcome only by proof of non-payment of premium for within 30 days after notice.

The holding of the supreme court of New York in the Fischer case, *supra*, is also directly in point to the same effect.

Wherefore it is respectfully submitted that the pleading in the case at bar would have been sufficient if the case had been brought in the State court of New York, and consequently it was sufficient in the Federal court of Washington.

The courts of the United States can and should take notice of the laws and judicial decisions of the several States; and that in respect to these *nothing is required to be specially averred in pleading which would not be so required by the tribunals of those States respectively.*

Pennington *vs.* Gibson, 16 How., 65.

In the Griesemer case (10 Wash.), above cited, the complaint was substantially the same as the complaint in the case at bar.

The distinction which we have endeavored to point out between the case at bar and the Wyler case is, we think, taken and elucidated by the Supreme Court of the United States in its decision in the Wyler case, in which the court say:

"This conclusion is strengthened by the fact that in most of the States the laws of the other States are treated as foreign laws, which must be pleaded and proven. Although this rule is not invariably adhered to, it is a part of the law as administered in the State of Missouri. *The suit here was brought in a Missouri court and was necessarily controlled by the laws of that State.*"

The essential difference in the principle between a case originally commenced in a State court and one instituted in a Federal court is worked out by the Supreme Court in Hanley *vs.* Donohue, *supra.*

At the time the court gave judgment on the pleadings in this case not a single issuable fact alleged in the complaint was controverted by the answer. The allegations of the complaint stood as confessed (except the allegation that the contract was made in New York, concerning which the facts in regard to the execution and delivery of the contract were pleaded in detail in the affirmative matter in the answer), and the plaintiff in error attempted to avoid the effect of this confession by the new matter in its answer. If this matter in the answer then showed a right in the defendant in error to recover of the plaintiff in error, as has been before shown and as is established in the decision in the Baxter case, *supra*, under the rules of pleading as established by the decisions of the court of last resort in the State of Washington, judgment was properly rendered, even though there was a variance between the allegations of the complaint and the allegations of the answer upon which judgment was rendered.

Megrath *vs.* Gilmore, 15 Wash., 558; 46 Pac., 1032.

The circuit court of appeals for the ninth circuit, by Hawley, J., held, upon identical pleadings in the Hill case (97 Fed., 263–269), which is now before this court on certiorari:

"In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this: that the plaintiff's right of recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance. The cause of action set out in the complaint was based upon the

identical facts upon which the court gave judgment. There was therefore no departure in this case either from fact to fact or from law to law, and hence the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several States. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense."

Ins. Co. *vs.* Hill, 97 Fed., 263, on p. 269.

Judge Gilbert, of the same bench, held the same doctrine in the case of Dingley *vs.* Mutual Life Ins. Co. (not yet reported).

VIII and IX

relate to the act of 1897.

Preliminary Statement.

On April 8, 1897, the legislature of New York passed an act, the title of which is: "An act to amend the insurance law and the act amendatory thereof, relative to capital and surplus."

The first section reads:

"SECTION 1. Section sixteen of chapter six hundred and ninety of the Laws of 1892, * * * known as the insurance law * * * is hereby amended to read as follows" (here follows the matter referred to in the title.)

The second and third sections are:

"SECTION 2. Section 92 of said chapter is hereby amended so as to read as follows:

"SEC. 92. NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall *within one year after the default* in payment of any premium, installment or interest declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon

the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, *within one year from the failure* to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address *in this State*, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. *No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.* (Italics ours.)

"SEC. 3. This act shall take effect immediately."

The plaintiff in error makes two points upon this statute, THE FIRST (which is discussed herein as division VIII) that—

The act applies to this policy, and the right of action thereon expired, because of the one-year limitation provided by the act, on May 17, 1897, one year after the passing of the May 18, 1896, premium.

And THE SECOND (which is discussed herein as division IX) that the act does *not* apply to this policy, except to dispense with the statutory notice of the statute of 1877 or 1892 (or both), as to the premium payable May 18, 1897. This result is said to come about because (it is claimed) the act of 1897 repeals the act of 1877 and section 92 of the act of 1892 as to all outstanding as well as future policies issued to non-residents of the State of New York.

The first of these points is raised for the first time in the petition for certiorari and brief in support thereof. The second is raised for the first time in the brief on the merits *in this court.* Both are raised in this court for the first time. *Neither was raised in or presented to the court of appeals.* This is shown by the decision of the court of appeals, and the showing will be supplemented by a certified copy filed in this court of the brief of the plaintiff in error filed in that court.

Preliminary Discussion of Points VIII and IX.

The Question of the Applicability or Effect of the Statute of 1897 Should not be Considered by this Court.

This case was submitted to the circuit court on the applicability of the statute of New York of 1877 only. The defendant in error claimed at the trial in the circuit court that the statute of New York of 1877 applied to the contract and governed the liability of the parties. The plaintiff in error contested this claim on the following grounds only:

That the statute of 1877 had no application for the reason that the contract was a Washington contract, and forfeited for non-payment of premiums; that the statute of New York of 1877 did not require the notices mentioned in the act to be served on non-resident policy-holders; that the notice required by the act of 1877 was by an express provision of the policy waived; that no tender of premiums had been made prior to commencement of action; that even if the act applied, defendant in error was estopped from claiming that the policy was not forfeited under the act of 1877; that the cause of action was not properly pleaded, and that there was a departure.

These questions and these only were presented to the circuit court of appeals as grounds for reversal. The opinion of the circuit court of appeals, found in the record, fully sustains this claim. The answer of plaintiff in error (see record) is based on the above points and those only. We will file with this brief certified copies of the brief of plaintiff in error which it filed in the circuit court of appeals, which shows conclusively that the above points were the only ones raised and presented to the circuit court of appeals. The plaintiff in error submitted its case to the

circuit court of appeals for reversal on those points and upon none others. It was never suggested by it at any time prior to the filing of its writ of certiorari here that there was in existence any such statute as that of 1897, much less was any claim made or based upon the statute of 1897. Having submitted its case thus made to a court whose decision is final, except in case of great gravity, etc., it is too late for plaintiff in error to raise the point in this court. It is a rule of practice, which we think is universal, that a party cannot raise a question in an appellate court that he did not raise and bring to the attention of the trial court, except it be one of jurisdiction. In such cases the party has as a matter of right an appeal to the appellate court. With how much greater force should the rule apply in a case where he has no such privilege of appeal as a matter of right, but where the right of appeal lies solely in the discretion of the higher court?

The writ of certiorari is similar to a writ of error to a State court, save that in the latter it is one of right when the question, being one reviewable by this court, is properly presented both to the trial and the supreme court of the State, but if such question is not presented and urged before both the trial and the supreme court the right to such a writ is lost, for the reason that this court will not review a case which is final in the State court unless it affirmatively appears that the questions were raised and pressed upon the attention of the court. This court, we take it, will not exercise its discretion in granting a writ of certiorari on a point not raised or urged either in the trial court or the circuit court of appeals, and we also take it that this court, having granted a writ of certiorari, will refuse to consider or entertain any point which was not presented to the court of appeals, because in that court the party appealing is certainly presumed to have presented his full case; that he has raised each and every question upon which he cares to have a decision or upon which he relies for a reversal. It cannot be

possible that a party has a right to submit a case like this to the circuit court of appeals, whose decision will be final, and, having submitted his case to that court on the questions raised and being beaten, can mend his hold by securing a writ of certiorari and again submitting his case on entire new and different grounds. It is the same in effect as it would be if after submitting his case to a court of final jurisdiction and judgment going against him, he would commence his action in the lower court on the same cause of action and try it anew on different points. In such a case it is held that he has presented his full case and raised every question possible in his favor. Hence the first case is *res adjudicata.*

A point similar to this is decided in Montana Railway *vs.* Warren, 137 U. S., 342, on page 351:

"The question now arises whether our inquiry is limited to matters presented to and considered by that court (supreme court of the Territory of Montana) or should be broadened to all matters that transpired at the trial. Obviously the former. Error is alleged in the judgment of the supreme court of the Territory; and if in all matters presented to it its rulings were correct, it cannot be affirmed that its judgment was erroneous, because there were in the record matters not vital to the question of jurisdiction or the foundation of right, but simply of procedure, to which its attention was not called, and in respect to which its judgment was not invoked. All such matters must be considered as waived by the complaining party. It would be an anomaly, if a party feeling himself aggrieved by the rulings of a trial court could appeal to the supreme court of his Territory and invoke its judgment on certain alleged errors; and when defeated there could transfer the judgment of that territorial supreme court to this and ask a reversal here on its judgment involving matters of procedure in the prior trial to which its attention was not directed. It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course if the trial court had no jurisdiction, that is a matter which is always open, and the atten-

tion of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived and they are waived when the attention of the reviewing court is not called to them. Our conclusion, therefore, is that our inquiry in this case is only in relation to the matters presented to and reviewed by the supreme court of the Territory."

Mr. Justice Miller, in the case of Marine Bank *vs.* Fulton Bank, 2 Wall., 252, at page 258, states clearly the rule we are contending for in these words:

"The counsel for plaintiff in error raises the point, that the action was for trespass on the case for wrongfully receiving the depreciated paper, and that the circular is a sufficient defense to such count. This is undoubtedly true, both as to the nature of the action and as to the effect of the notice, and if it had been in any manner made a point of in the court below, we do not see how we could avoid reversing the judgment. But nothing of the kind was done. * * * It is now too late to object for the first time to the particular form of action."

"The other questions presented by the assignment of errors and argued here cannot be considered, as the record does not show that they were brought to the attention of either of the courts below" (Walker *vs.* Sauvinet, 92 U. S., 93).

The case of Springer *vs.* The United States, 102 U. S., 485, is clearly in point. The following extract from the opinion, on page 593, clearly states the necessary facts and the conclusion of the court:

"Other alleged errors, however, have been pressed upon our attention and we must dispose of them. There is clearly a misrecital in the deed of one of the acts of Congress to which it refers. By the act of the 30th of March, 1864, was clearly meant the act of the 30th of June, in the same year. There is no act relating to the internal revenue of the former date, but the plaintiff in error cannot avail himself of this fact for several reasons. In the first place, the point was not brought to the attention of the court below and cannot therefore be insisted upon here."

"It was insisted also, that when Thorn failed and the dealings between him and the plaintiff ceased, they were bound to notify the guarantor of the existence of the debts due them by Thorn, and for which Bruen was held liable, in a reasonable time after the dealing ceased: That Thorn failed April 10, 1837; and the notice was not given until December 31, 1838; the debts sued for in the first three accounts of the declaration being then due: Therefore, the notice was too late and the defendant discharged. The record shows that this notice was not brought to the consideration of the circuit court. We do not, therefore, feel ourselves at liberty to express any opinion upon the question."

Bell *vs.* Bruen, 1 How., 169, 187.

"Objection is also taken to the validity of the State law upon the ground that it is in conflict with the provisions of the Federal Constitution, which secures to every party, where the value in controversy exceeds $20, the right to trial by jury. Two answers may be made to that objection, either of which is decisive: 1. That it does not apply to trials in State courts. 2. That no such error was assigned in the court of errors and that the question was not presented to, nor was it decided by, the court of errors."

Edwards *vs.* Elliott, 21 Wall., 532, 557.

"In the present action, which was tried before the other was brought, the objection that the contract sued on was *ultra vires*, was not pleaded, nor in any way brought to the notice of the court below. The defendant, therefore, is not entitled to avail itself of it upon this writ of error."

Pullman Co. *vs.* Central Transp. Co., 139 U. S., 62.

In the case of San Piedro Company *vs.* The United States, 146 U. S., p. 120, this court says:

"The district court, as heretofore stated, found for the defendant, and entered a decree dismissing the bill. An appeal having been taken to the supreme court of the Territory, the entire record was transferred to that court. There no new motion to strike out this disposition, or any part of it, was presented, nor were the two motions made in the district court renewed in the supreme court, or action

asked of that court thereon. Obviously the defendant, relying on its success in the district court, with this testimony in the case and before the court, did not deem the matter of sufficient importance either to renew the motions made in the district court or to file additional ones, and so let the case pass to the consideration of the supreme court with all the testimony, including this disposition, unchallenged. But our inquiry is limited to the rulings of the supreme court of the Territory; it is its judgment which we are reviewing. By the appeal the case was transferred as a whole from the district court to the supreme court. The rulings of the former court did not bind or become those of the latter, either as to the admission or rejection of testimony or the decree to be entered. All the testimony taken and filed in the one court was spread before the other, and was apparently proper for its consideration. If the defendant had wished to narrow the examination of that court to any portion of the testimony, it should by appropriate motion have expressed the objectionable parts."

This question of the applicability of the statute of 1897, as we have fully shown, was not in any manner presented to the circuit court of appeals. Why it was not we can only conjecture, but that it was not we have clearly shown. Surely the plaintiff in error cannot claim that it was ignorance of the statute. In fact, it ought not be heard to make any such claim, because the statute now relied upon was enacted by the State of its creation and official residence, and it was bound as a matter of law to know of that act as a law; yet scarcely had the opinion of the lower court been filed before it presented here its petition for a writ of certiorari. At that time, if it cared to deal fairly with the circuit court of appeals, it might have brought the statute of 1897 to its notice by a petition for a rehearing, but, on the contrary, immediately or within a very short time after the decision of the circuit court of appeals, it appeared here with this application for a writ of certiorari, and in that petition for the first time raised the question of the applicability of the New York statute, and then only as

statute of limitations. This is not fair nor proper treatment either of the circuit court of appeals or the defendant in error, who must bear the cost of trying a case here on grounds never raised in the trial here or in the circuit court of appeals.

VIII.

The Action is Not Barred by the Limitation Created by Act of 1897.

The portion of the statute immediately involved in the discussion of this point is (as plaintiff in error says in the brief) the closing sentence of section 2, viz:

"*No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.*"

1.

This is a statute of limitation, pure and simple. "No action shall be maintained * * * unless instituted" * * *

Conceding for the sake of the argument only of this subdivision that the statute is otherwise applicable to the *policy* at bar, and that the prescribed year period had run when the action was commenced, nevertheless it is not applicable to the case at bar, because—

The Bar Is Not Pleaded.

We do not mean by this that the statute need have been pleaded *as a statute*, but the bar of the statute must have been set up as such; otherwise by express provision of law it is waived. This being an action at law, the practice es-

tablished by the Washington statute governs the pleadings. The Washington statutes (2 Hill's Code) applicable are the following:

"SEC. 189. The defendant may demur to the complaint when it shall appear upon the face thereof, either—

"6. That the complaint does not state facts sufficient to constitute a cause of action.

"7. That the action has not been commenced within the time limited by law."

(Subdivisions 1 to 5 relate to other grounds.)

"SEC. 111. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer."

"SEC. 191. When any of the matters enumerated in section 189 do not appear upon the face of the complaint, the objection may be taken by answer.

"SEC. 193. If no objection be taken by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court."

The plaintiff in error (in its Brief, pp. 77 to 83) endeavors to avoid this point on the ground that where a cause of action is created by a foreign statute which imposes a time limitation upon its enforcement the limitation is upon the right as well as the remedy. From this premise the conclusion is (impliedly) drawn that the rule requiring the defense of the statute of limitations to be specially pleaded (whether by demurrer or answer) is inapplicable. In support of this contention a number of authorities are cited which hold that in such a case the foreign statute prevails over a domestic statute,

permitting a longer period of delay. The cases cited do so hold, but none of them support the conclusion drawn by plaintiff in error and above stated, as the following review of them shows.

In Bear Lake *vs.* Garland an action was begun in Utah to foreclose a mechanics' lien given by the Utah statute, which imposed a time limitation on the action. It was specially pleaded that the action was barred by that statute.

In Hill *vs.* Supervisors, 119 N. Y., 347, the question was whether the general statute of limitations of New York or a special statute (prescribing a shorter period), also of New York, applied. The shorter period was specially pleaded as a bar.

In Hamilton *vs.* Royal Ins. Co., 156 N. Y., 338, a short limitation prescribed by contract was specially pleaded as a bar. The question arose whether a provision in the general limitation statute to the effect that an attempt to commence action should be equivalent to commencement applied. Held, yes; and so, too, if the short limitation had been prescribed by a statute.

In "The Harrisburg," 119 U. S., 199, the premise of plaintiff above stated is held. There is no discussion as to method of raising the question, and it does not appear from the opinion how it was raised, but the record of the case (in the office of the clerk of this court) discloses that the foreign statute was pleaded both by special demurrer and by answer *as a bar.*

In Cavanagh *vs.* Nav. Co., 13 N. Y. Suppl., 540, the action arose upon a foreign statute which imposed a time limitation. This was specially pleaded *as a bar.* The plaintiff sought to avoid it by bringing himself within an exception established by the general statute of limitations of New York. Held, the foreign statute governed and the exception did not apply.

In Daily *vs.* R'y Co., 57 N. Y. Suppl., 485, an action was brought in New York to enforce a right created by a Penn-

sylvania statute, New York having a like statute. The home statute allowed two years, the foreign one year. The running of the foreign statute was specially pleaded as a bar and held a good plea.

In Boyd *vs.* Clark, 8 Fed. Rep., 849, the same question was raised by a special demurrer and decided the same way.

In Taylor *vs.* Iron Co., 94 N. C., 525, an action was brought in that State upon a cause of action created by statute of that State imposing a short limitation. The plea of the statute as a bar was set up in answer and held good.

In Hudson *vs.* Bishop, 35 Fed., 820, the question arose under a Wisconsin statute providing for a guardian's bond, but limiting action upon it against the sureties to four years. An action was brought in Iowa after four years. Held, the Wisconsin limitation governed. The question was raised by a special demurrer (see same case, 32 Fed., 519).

In Eastwood *vs.* Kennedy, 44 Md., 563, a set-off was interposed to recover usurious interest based upon a District of Columbia act (of Congress) giving the action, but imposing a time limitation. The bar of that statute was pleaded in reply.

In Comm'rs *vs.* Bucker, 48 Fed., 533, the objection of the statutory limitation of an act of Congress was interposed by *special* demurrer, and held permissible in that form.

The following cases, cited by plaintiff in error, come nearer the point, but do not support its conclusion:

In Lambert *vs.* Ensign Manfg. Co., 42 W. Va., 813, the action was brought in West Virginia to recover for death occurring in that State, the right of action being given by a statute of that State carrying with it a time limitation. Held that where the lapse of time appeared on face of complaint the objection was reached by a general demurrer. But it is seen by the prior decision of the same court cited in support of it (21 W. Va., 601) that the practice of that State permits the objection of the bar of the general stat-

ute of limitations to be taken by general demurrer when the facts appear on the face of the complaint.

In Barker *vs.* Hannibal R. R., 91 Mo., 86, a Missouri statute gave an action for death of husband to widow if she sued within six months; otherwise to minor children. Held a complaint by widow, which fails to allege that death occurred within six months prior to commencement of action, is vulnerable to general demurrer.

City of Eureka *vs.* Merrifield (Ka. Court Appeals), 58 Pac., 243, follows that case in an action brought in Kansas for death occurring in Missouri.

Palen *vs.* Johnson, 50 N. Y., 49, is like the Missouri case. The right to cover usurious interest was given to the borrower for one year, and for the next three years to public officers. A ruling by the lower court, where it appeared by the borrower's complaint that the action was instituted after the expiration of his year, sustaining a general demurrer to the complaint, was sustained. The remaining citations of the plaintiff in error do not touch the point.

The contrary doctrine has been pointedly held by this court:

"There was no error in not allowing the statutes of limitation of New York and Illinois to be offered in evidence, after the court had overruled the motion of the defendant to be allowed to plead them as a defense. The only way in which such statutes are available as a defense is when they are at the proper time specially pleaded (1 Chitty on Pl., 514, 515; Stephen on Pl., 76, note; Wilson *vs.* King, 83 Ill., 232).

"With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only to be said that the courts of the United States take judicial notice of all the public statutes of the several States."

Gormley *vs.* Bunyan, 138 U. S., 623.

Retzer *vs.* Wood, 109 U. S., 185 (holding such to be the law in New York).

2.

If the sentence of the statute under consideration means anything, it is that action must be commenced within one year after default. If notice is given and not complied with, action must be commenced within one year after the expiration of 30 days following the mailing of the notice, for the policy-holder is not in default during the 30 days. If notice is not given, action must be commenced within one year after the expiration of *one year* following the due date, for by the preceding provisions of the act (1897) the policy-holder is not in default during the year following the due date. Since no notice was given Sears in 1897, he was not in default under the terms of the act of 1897 at the time of his death, for that event occurred March 30, 1898, less than one year after the due date (May 18, 1897), and this action was commenced less than one year thereafter.

3.

The context of the act confines the application of the bar imposed by the closing sentence to cases arising under the act, and enforces a prospective application only of the closing sentence. The act took effect April 8, 1897. Mr. Sears died less than one year after its enactment. The contract was subsisting at the time of his death, and the action was commenced within six months thereafter.

4.

The discusssion so far has proceeded upon the supposition that the act of 1897 applies to this policy. The contention of the defendant in error that it clearly does not is covered fully by the discussion under the next point.

IX.

The Enactment of the Act of 1897 Did Not Dispense with the Statutory Notice Theretofore Prescribed.

1.

THE ACT OF 1897, IF SO INTENDED, WOULD CONSTITUTE AN IMPAIRMENT OF THE CONTRACT.

In Walker *vs.* Whitehead, 16 Ark., 314-317, the court says:

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement.

"The contract (a policy of insurance) is to be read as though the act (of 1876) had been literally incorporated into it" (De Frece *vs.* Ins. Co., 136 N. Y., 144, 151).

In that case, as in this, the parties are conclusively presumed to have contracted with reference to the law of 1877, and it is as much a part of the contract as though they had inserted the words of the act verbatim in the policy and had made those provisions a portion of the written contract, except, being a statute of public policy, its provisions dominated all others. In this case this statute was brought into the policy both by express stipulation of the parties and by force of the statute itself.

In a prior case, Baxter *vs.* Ins. Co., 119 N. Y., 450, 434, the same court says:

"This statute was a part of the contract in question, and governed the rights and obligations of the parties precisely the same and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

This means exactly what it says. It means that this statute is as much a part of the contract as any other provision. After the statute became a part of the contract its repeal or modification would not affect the contract any more than it would any other portion of the written contract. The laws in force in New York at the time the contract became binding are the only ones that affect this contract, not those in force ten years prior thereto or ten years subsequent. The company is presumed to have excepted the first and subsequent premium and agreed to accept future ones on the theory that its obligation to pay the face of the policy in the event of the death of the insured was wholly measured by the policy and the laws then in force. In case of lapse after the payment of three annual premiums, its liabilities would also be measured by the law of New York of 1879 relative to the reserve. It made its contract expressly subject to those laws. How can it complain if its obligations are thus determined?

If the legislature had by subsequent enactment provided that the insured should have the benefit of all the reserve on his policy instead of two-thirds under the law of 1879, would it not contend that such an act could not be retroactive, and could not affect its contract already in force? It certainly would, and its contention would be sustained. On the other hand, if the law of 1879, in force when a contract of insurance was made, should subsequently be amended so as to give the insured, in case of lapse, but one-third of his reserve on premiums paid or to be paid, could not the insured complain and successfully maintain that no law could be given such retroactive force? Certainly so. A subsequent law could not reach back and make a new contract between the parties nor can it look ahead and release either party from contractual obligations each is bound to perform.

Mr. Sears could also say, by the laws in force at the time I made my contract, and under the construction of those

laws by the highest court of New York, my premium was not due until 30 days after service of the statutory notice. The application for the insurance was on the printed blanks furnished by the company, which contained a provision that the policy applied for was to be made, if at all, "subject to the charter of the company and the laws of New York." If the policy, when issued, contained a provision in conflict with one in the application, then that provision most favorable to the insured must prevail. More than that, any provision of the contract in conflict with the statute thus brought into the contract must be subservient to it. So this statutory provision in regard to notice not only prevails by force of the statute, but also by agreement of the parties. The right to a notice under such an agreement is as much a part of the contract and as much a part of its obligation as any other provision of the contract in favor of the assured. Under this contract the due date of the premium was not the date named in the policy, but was thirty days after the service of the notice. It might be the date named in the policy or any day subsequent, depending entirely on the service of the notice. This is one point wherein the Rosenplanter case is unsound and in conflict with decisions of the New York court. Such a change made as claimed by plaintiff in error and by the court in the Rosenplanter case by the law of 1897 would thus alter the terms of the policy both as to the due date and the method of the forfeiture of the policy. As said in the Baxter case, *supra:*

"The duration and validity of the policy is not dependent on the payment of the premium on the day named therein, but upon payment within 30 days after notice."

Again:

"In the absence of proof, on the part of the defendant, this allegation (of due performance) of the complaint was sufficiently established *within the meaning of the contract*, as

evidenced by the policy and the statute when read together. * * * When the provisions of this statute (1877) *are adopted in* a contract of insurance (we have heretofore shown this statute was brought into the case in the same way as the Sears) for the purpose of modifying the forfeiture clause, these conditions should be so construed as to give the assured the full benefit contemplated."

This language is surely meaningless unless we take the court at its word when it says that the *contract is evidenced* by the policy and the statute together. It means that the rights conferred by the statute were as much contractual rights as those contained in the printed contract, none of which may be taken away or impaired. Speaking of a policy of insurance executed while this statute of 1877 was in force, the second circuit court of appeals, through Judge Wallace, in Hicks *vs.* Ins Co., 60 Fed., 690, uses this language:

"The policies being New York contracts, were of course dominated by the statute respecting forfeitures as completely as though the statutory condition had been explicitly incorporated in them."

Then this statute was not a mere regulation of the insurance companies in respect to declaring forfeitures of policies made while it was in force, as held in the Rosenplanter case, but the statute entered into and became a part of the contract. We think this claim we make is supported by all the authorities save the Rosenplanter case.

The supreme court of Texas says:

"We think the provisions of the New York statute under the facts shown in this case entered into and became a part of the contract between the parties."

Mullen *vs.* Ins. Co., 89 Tex., 259, 261.

The supreme court of Washington, in Swinburn *vs.* Mills, 17 Wash., 611, 615, states this rule clearly:

"It is a principle so often enunciated and so uniformly maintained that the law which is in existence at the time a

contract is made becomes a part of the contract, that it would be idle to cite authorities on the proposition or to further mention it. In this case it is especially stipulated in the mortgage that the laws in force at the time the contract was made should become a part of the contract, but in the absence of such a stipulation the effect would be exactly the same."

This court has so often announced the doctrine we are contending for that it seems useless to discuss it on cite authorities in support of it. But we will quote from the case of Edwards *vs.* Kearnsey, 96 U. S., 595:

"It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms."

This case, as well as the one above referred to from Iowa, was one where the intent of the legislature to make an act retroactive was apparent and so found to be the intent by the court.

This identical question has been presented to the court of civil appeals of Texas in Germania Life Ins. Co. *vs.* Peetz, 47 S. W. Rep., 687 (1898), as follows:

One Langholz was insured by the Germania Company, a New York corporation, in 1876, after the enactment of the New York anti-forfeiture act of 1876. He failed to pay a premium payable on May 12, 1895, the statutory notice of which was mailed him twenty-six days prior to the due date (a timely notice under the act of 1892, but four days too late according to the act of 1876). He died later in 1895. The company defended on the ground that the policy had become forfeited because of said default and notice, claiming that the contract was governed by the act of 1892, not by that of 1876. The application and the policy provided that the contract should be construed according to the charter

of the company and the laws of New York, that being agreed to be the place of contract. The court held:

"The statute of New York as it was at the date of the contract became a part thereof. Phinney *vs.* Insurance Co., 67 Fed., 493; Mullen *vs.* Insurance Co., 89 Tex., 259; 34 S. W., 605; Baxter *vs.* Insurance Co., 119 N. Y., 454; 23 N. E., 1048. As stated in the last case cited, 'the statute was a part of the contract in question, and governed the rights and obligations of the parties in precisely the same way and to the extent as if all its terms and conditions had been actually incorporated into the policy.' The policy involved in that case contained the condition that it should be void upon failure to pay the premium when due, similar to one of the conditions in this policy.

"We are of the opinion that the legislature of New York could not by subsequent acts abridge or take away the insured's right to the particular notice which the law of that State prescribed at the time of the contract. In Carter *vs.* Insurance Co. (decided by the New York court of appeals in 1888), 17 N. E., 396, it seems to be decided that the payment of each annual payment constitutes a renewal of the policy, within the meaning of the term 'renewed' as used in the insurance statutes of that State; and it was there held that the holder of a pre-existing policy which contained no provision as to notice concerning premiums became entitled to notice, after the act of 1876, requiring companies to give a notice in respect to policies thereafter issued or renewed. But we apprehend that the court did not intend by this to decide that, where a pre-existing policy is contracted with reference to a certain notice, the legislature would have power afterwards to dispense with or abridge that right, as would be the case here, if we should hold that the policy became governed by the provisions of the act of 1892 in respect to notice. We agree with appellee in the proposition that the legislature was without power by its subsequent enactments to amend the contract in question, to the detriment of this right of the policy-holder to the notice contracted for, and to substitute therefor another notice not so ample; and inasmuch as there was no forfeiture or lapse of the policy, and therefore it at no time assumed the form of a new contract between the parties, the act of 1892 has no effect in the case. The notice prescribed by the law of 1876 was not given, and the policy

was not forfeited when Langholz died, unless it be true, as appellee insists, that the provision of the statute of 1876 was not intended to apply to policies calling for semi-annual premiums."

Drierson *vs.* Alsop, 27 Gratt., 229.
Farmers' Bank *vs.* Gunnell, 26 Gratt., 131.

2.

The Statutory Provisions Requiring Notice Which Were in Effect at the Time of the Enactment of the Act of 1897 Were not Repealed Thereby as to Existing Policies.

The argument of plaintiff in error amounts to this: The act of 1877 imposed a public-policy obstacle in the way of a certain provision of the contract which the parties desired to make between themselves; the act of 1892 repealed that act, but by section 92 again imposed the obstacle; the act of 1897 is a repeal of section 92 as to non-resident policy-holders; therefore the obstacle was removed prior to the 1897 due date, and the contract came forth as originally intended. The position of plaintiff in error *depends* on the asserted repeals. If act of 1877 is not repealed, or if act of 1892 supplanted it but is not repealed, the proposition advanced by plaintiff in error falls to the ground.

a.

The Act of 1892 Did Not Repeal the Act of 1877 as to Existing Policies.

There is in the act of 1892 an express repeal of the act of 1877, but it is coupled with a saving clause as to certain past transactions. If the Sears policy is embraced within the enumerated past transactions, it is still in force now as then, with the act of 1877 incorporated in it. The policy

of the law favors a legislative intent not to interfere with previously acquired rights. The saving clause is:

"SEC. 291. The repeal of a law or *any part of it* specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to October 1, 1892, under or by virtue of the laws so repealed, but the same shall be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such laws had not been repealed."

It is confidently asserted that the making of the Sears policy, embodying the act of 1877 by mutual adoption, as well as by force of law, was an "act done," and the rights of the parties thereunder (as to terms of forfeiture, as well as time of default) were "rights accrued or acquired," "under or by virtue of the act (of 1877) repealed;" that such rights as had not accrued were "accruing" under or by virtue of the said act, and that therefore by legislative affirmation the said "act done," "rights accruing, accrued, or acquired" "shall be enjoyed, asserted, enforced, * * * as fully and to the same extent" as if the act of 1877 had not been repealed.

If the act of 1877 *was* repealed by that of 1892 (as the company claims) its provisions remained a part of the Sears contract by virtue of section 291 of the act of 1892, if not by virtue of their mutual adoption.

b.

The Act of 1897 Did Not Repeal the Act of 1877, Nor Section 291 of the Act of 1892.

The provisions of the act of 1877 as a part of the Sears policy were in force on April 8, 1897 (date of passage of act of 1897). This resulted (disregarding for the moment the theory of contract adoption) either by virtue of the act of

1877 or of section 291 of the act of 1892. If the former, since they remained in force notwithstanding the act of 1892, it is clear that the act of 1897 did not affect them, for it is only an amendment of section 92 and contains no reference to the act of 1877 nor to any contract or right thereunder. If the latter, certainly the act of 1897 contains no reference to section 291 of the act of 1892, but only purports to amend section 92 of that act.

c.

It is argued that the re-enactment (repetition) in the act of 1892 (section 92) of the words "hereafter issued or renewed," which occur in the act of 1877, indicates a legislative intent to bring existing policies under its provisions. Authorities are cited which so state the general rule; but of course the repetition would not have that result if the legislative intent appears from other provisions of the amendatory act to be otherwise. This exception, for which we argue, is recognized in the case of Kerlinger *vs.* Barnes, 14 Minn., 526, from which the following is quoted:

"But it is claimed, substantially, that the language quoted is merely copied from the act of which it is amendatory, and is to receive the same construction in the amended section which it had in the original one; that, therefore, it must be held to embrace all judgments rendered after the passage of the act of 1868 (*meaning the original act*). It is true, generally that when amendments to statutes are made in this form (the form referred to is 'amended so as to read as follows') 'the portions of the amended section which are merely copied without change, are not to be considered as repealed and again re-enacted, but to have been the law all along (Ely *vs.* Holton, 15 N. Y., 585; Burwell *vs.* Tullis, 12 Minn., 575.)' *If, however, it appears that the legislature did not intend merely to repeat or copy the language of the original law, but, although using the same words, intended them to have a different meaning and effect, the rule is not applicable.*" (Parentheses and italics ours.)

That exception, that indication of a different purpose in the act of 1892, is to be found in section 291 thereof, which makes specific provision for existing policies.

d.

The Act of 1897 Did Not Repeal Section 92 of the Act of 1892 as to Existing Policies.

The question as to whether policies existing under the act of 1877 were brought under section 92 of the act of 1892 is material to the case at bar only in the way of an argument, for the provisions of section 92 are as favorable to the Sears policy as those of the act of 1877. The argument which the company builds upon it is that the copying of the words "hereafter issued or renewed" from the act of 1877 into section 92 of the act of 1892 brought existing policies under section 92, and therefore the copying of the same words again into the act of 1897 brought existing policies under the act of 1897. But if the Sears policy was not (as we have endeavored to maintain) brought under section 92, it could not be carried from there into act of 1897 by the mere repetition of the said four words. On the other hand, if it was brought under section 92 of the act of 1892, it does not follow that it was carried from there into the act of 1897, for we find in the act of 1897 even stronger indication of a contrary legislative intent, even stronger reason for applying the exception rather than the general rule as to the effect of copying words indicating a retrospective construction. Section 92 of act of 1892 referred to *all* policies "hereafter issued or renewed," the act of 1897 only to policies "hereafter issued or renewed" to residents of New York. This circumstance is significant of a legislative purpose to give the word *hereafter* its ordinary meaning—to give it the effect of a new enactment—to make it speak for the future only.

In one part of the brief of the plaintiff in error it is argued that the Sears policy is brought under the act of 1897, in another part that it is not, or, to state it more fairly to the company, in one breath it claims the policy is brought under the prospective effect, in another breath that it falls under the repealing effect of the act. It is claimed on behalf of the defendant in error that the act of 1897 left all existing policies as they were, with the law in existence at the time of their execution a part of them, and dispensed with the statutory notice as to future policies to be issued to non-residents. This brings the discussion to the question of the repealing effect of the act of 1897. It amends section 92 of 1892 to "read as follows." There is no word of express repeal. If it repeals, it does so by implication, and the implication arises, if it arises at all, only as to parts of the original section omitted from it, and as to those, only if the implication is unavoidable (12 L. R. A., 50).

"Repeal or no repeal is a question of legislative intention."

U. S. *vs.* Claflin, 97 U. S., 546–549.
Matter of Water Commissioners, 66 N. Y., 413–422.

The company, in its brief, assumes that the amendment of an act "so as to read as follows" repeals all omitted provisions, and the rule will be found laid down so broadly in some cases and text books, and it is upon that assumption that its whole argument on this point turns; but the court of appeals of New York has time and again held the repeal in such a case is *as to the future only* and the omitted parts of the original statute remain on the statute book to sustain past transactions under them. These decisions hold that such is the legislative intent in the State of New York, regardless of any constitutional question as to impairment of vested rights—that is to say, that the rule holds good, though no right would otherwise be impaired.

"The form in which amendments, both of the Code and of the Revised Statutes have generally been made by declaring that particular sections shall be amended so as to read in a given way was adopted for the purpose of adjusting them to the original enactments, so that when the system should, after repeated amendments, become complete, the different parts might be to go without further revision, and thus form a perfect code. The portions of the amended sections which are merely copied without change, are not to be considered as repealed and again enacted, but have been the law all along, and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The rule contended for would lead to the grossest absurdities. Proceedings which were quite regular when taken, would be made irregular or void by force of the subsequent statute and confusion of every kind would be induced. * * * In short, we attribute no effect to the plan of dovetailing the amendment into the original section, except the one above suggested of preserving an harmonious text, so that when future additions shall be published, the scattered members shall easily adjust themselves to each other. *In other words, we consider the amendment as one equivalent to an independent statute* declaring in general language that an appeal may hereafter be taken from an order granting a new trial on complying with the conditions mentioned."

Ely *vs.* Holton, 15 N. Y., 595–598.

In People *vs.* Supervisors, 67 N. Y., 109, the question turned upon the effect to be given to chapter 664 of the Laws of 1867 and the same act as amended by chapter 525 of the Laws of 1873. The original act created the remedy; the amendatory act of 1873 amended the original act "so as to read as follows," modifying the former act in several particulars. The court held the act of 1873 to be the only law in force, and, further—

"The earlier statute had been merged by being incorporated and united with new provisions in the amendatory act substituted for it. The general rule is that if a statute that repeals another is itself afterwards re-

pealed, the first statute is thereby revived without any formal words for that purpose. * * * With us the amendment of a statute or part of a statute by making the same read as prescribed by the amendatory statute thus incorporating all that is deemed advisable to retain of the old law in the new, is not regarded as a repeal of the parts thus transferred, but from the time of the passage of the new statute the whole force of the enactment rests upon the later statute. Although the former act remains upon the statute book and is not repealed either expressly or by implication, it is no longer the law of the land in respect to new cases that may arise. * * * During the existence of the law of 1873, no part of the law of 1867 was in force or could be referred to for any purpose *except to sustain past transactions under it.*"

The same principle is maintained in the subsequent case of Reid *vs.* Supervisors, 128 N. Y., 364-373, in which the court, in discussing the effect of an amendatory statute using the words "so as to read as follows," holds that "the original section is applicable to all prior sales, and the amendment is prospective in its operation. The original section may be treated as if it was permitted to stand and the amendment had been placed in a separate act applicable to future sales. * * * The amendment did not repeal the code limitations, but left them to apply to past cases and simply made a new rule to apply to future cases."

The principle is again asserted in Peoples *vs.* Wilderming, 136 N. Y., 363 (opinion by Peckham, J.).

"If then there is a repeal, it must be implied merely from the form in which the amendment is made; that the original section 'be amended so as to read as follows,' etc. This form of amending statutes is frequently used, and was adopted as a convenient mode of preserving an harmonious text by incorporating the amendments into the original law and presenting both together; except in this respect an amendment made in this way has no greater effect than if made in the form of an independent statute. * * * A repeal of a statute will not, as to existing rights, be im-

plied merely for the purpose of preserving an harmonious text."

Kerlinger *vs.* Barnes, *supra.*

"Where an act amends a prior act 'so as to read,' etc., the former act may yet be referred to as controlling past transactions."

Endlich, Interpretation of Statutes, sec. 294.

As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only. Especially should this rule of interpretation prevail where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertion of those rights.

Murray *vs.* Gibson, 15 Howard, 421.

It is the very essence of a new law that it shall apply to future cases.

McEwen *vs.* Den, 24 How., 242–244.

Although the words of the statute are so general and broad as in their literal extent to comprehend existing cases, they must yet be construed as applicable only to such as may hereafter arise, unless the intention to embrace all is plainly and unequivocally expressed.

N. Y., etc., R. R. Co. *vs.* Van Horn, 57 N. Y., 473–478.

In regard to the claim made on behalf of the plaintiff in error that the act of 1897 is declaratory of the previous acts, it is a sufficient answer that this court has held that a declaratory act or an act directing how a former act shall be construed is inoperative on the past, though controlling in future.

U. S. *vs.* Claflin, 97 U. S., 546–549.

e.

In Order that an Act be Upheld as a Validating Act, it is Essential that the Intent be Clearly Expressed.

The claim is made in the brief of the plaintiff in error that the effect of the act of 1897 as to existing policies issued to non-residents is to validate the forfeiture provision thereof which had always theretofore been invalid owing to the domination of the New York statutes. The authorities cited in support of the claim are (in the main, at least) cases where the legislature had passed a statute expressly validating certain contracts or classes of contracts which by virtue of a previous statute had been invalid. To illustrate, we refer to Gross *vs.* Mortgage Co., 108 U. S., 477, where the earlier act had forbidden a foreign corporation to take a mortgage on real property to secure a loan of money. The Mortgage Co., a foreign corporation, did so while the statute was in force. Afterwards the legislature passed an act providing that such mortgages should be valid and enforcible.

The doctrine we contend for is supported by the opinion of Judge Hanford in the Hathaway case (Appendix to plaintiff's brief, p. xxxix).

In other words, we contend that the express repeal of such a statute will not validate a contract or provision of a contract before unenforceable, but that it requires some affirmative legislative statement of such intent.

Mays *vs.* Williams, 27 Ala., 267.

Milne *vs.* Huber, 3 McLean, 212–216.

But if in making this claim we go too far, we are clearly right in claiming that an *implied* repeal is insufficient to accomplish that result, or (to minimize our claim further)

that in any event such a legislative intent will not be *presumed* in a case where the act is susceptible of the opposite construction.

Milne *vs.* Huber, *supra.*

Retroactive statutes, if valid, are to be subjected to such a construction as would circumscribe their operation within the narrowest possible limits consistent with the manifest intention of the legislature to be drawn from the language used.

Hedger *vs.* Rennaker, 2 Metc. (Ky.), 255.

We contend that such should be the holding in any event in a case where the earlier statute is adopted by the contract of the parties, so that its continuance as a part of the contract rests not alone upon the force of the statute, but also upon the agreement of the contracting parties.

In conclusion, it is respectfully submitted that the judgment of the circuit court of appeals is correct and should be affirmed.

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HAROLD PRESTON,
Of Counsel.

Additional citations that express repeal does not give life to void contracts:

Bank *vs.* Merrick, 14 Mass., 322.

Banchor *vs.* Mansel, 47 Me., 58–62.

Hathaway *vs.* Moran, 44 Me., 67.

Roby *vs.* West, 4 N. H., 285.

Nichols *vs.* Paulson, 6 Ohio, 305.

Jaques *vs.* Withy, 1 H. Blackstone, 65.

APPENDIX.

STATE OF NEW YORK:

COURT OF APPEALS.

CLERK'S OFFICE.

I, William H. Shankland, clerk of the court of appeals of the State of New York, do hereby certify that I have compared the annexed copies of the complaint, case, and exceptions and Exhibit A in the case of John T. Baxter, respondent, against The Brooklyn Life Insurance Company, appellant, with printed copies thereof taken from the case and exceptions submitted on the argument of said case in the court of appeals on the 29th day of January, 1890, and now bound up and contained in volume No. 8 of cases and points for the year 1890, and that the same are true copies of the printed copies of said complaint, case, and exceptions and exhibit contained in the volume aforesaid now remaining on file in this office.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this eighth day of November, A. D. 1899.

[Seal State of New York Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

SUPREME COURT, CATTARAUGUS COUNTY.

JOHN T. BAXTER
against
BROOKLYN LIFE INSURANCE COMPANY.

The plaintiff herein, by Cary & Rumsey, his attorneys, for a complaint and cause of action against the defendant, alleges upon information and belief that at all the times herein mentioned the defendant was and still is an insurance corporation, organized and constituted and doing busi-

ness under and by virtue of the laws of the State of New York and engaged in the insurance of the lives of persons.

That on or about the 24th day of May, 1884, the said defendant, for value received, made an agreement in writing with and issued its written policy to and on the life of Joel J. Matteson, whereby and in and by the terms of which the defendant, in consideration of the payments hereinafter named, agreed and undertook that within sixty days after the receipt by it of satisfactory proofs of the death of the said Joel J. Matteson it would pay to Maria Matteson, wife of the person hereby insured, for her sole use, the sum of three thousand dollars.

That it was agreed on the part of said Joel J. Matteson that in consideration of the issuance of said policy and the making of said agreement on the part of the defendant he would pay to it during his lifetime the sum of twenty dollars and ninety-seven cents each quarterly year, and that up to the time of the death of said Joel J. Matteson the said insured had made the payments upon said policy as agreed with said defendant.

Plaintiff further alleges upon information and belief that the said Joel J. Matteson died at the city of Bradford on the 7th day of September, 1884, and left him surviving his wife, Maria Matteson, for whose benefit said policy was issued and to whom the loss on the same was made payable.

Plaintiff further alleges upon information and belief that after the death of said Joel J. Matteson and on or about the 10th day of March, 1885, the said Maria Matteson caused to be delivered to the defendant proofs of the death of said Joel J. Matteson; that said proofs were delivered to one Jenkins, who was at said time in the employ of said defendant and who was duly authorized by it to receive the same; that the proofs of death so delivered to and furnished the defendant were satisfactory proofs of the death of said Joel J. Matteson and were made in accordance with the directions of said defendant.

Plaintiff further alleges upon information and belief that on or about the 10th day of March, 188[illegible] proofs of the death of the said Joel J. Matteson were delivered to the defendant.

Plaintiff further alleges upon information and belief that more than sixty days had elapsed from the time of the delivery of the proofs of loss, as aforesaid, up to the time of

the commencement of this action, and that the said sum of three thousand dollars came due and payable before the commencement of this action and remains wholly unpaid.

The plaintiff further alleges that before the commencement of this action and prior to the issuance and service of the summons herein the said Maria Matteson, by an instrument in writing, duly sold, assigned, and transferred to this plaintiff the said sum of three thousand dollars and interest due and owing to her by the defendant, and the claim and demand against the defendant for the same, and the right to sue for and collect the same from the defendant, and that the plaintiff is now the owner and holder of said demand and claim.

Wherefore the plaintiff demands judgment against the defendant for the sum of three thousand dollars, with interest thereon from the 10th day of May, 1885, besides the costs of this action.

CARY & RUMSEY,
Plaintiff's Attorneys, Olean, N. Y.

STATE OF NEW YORK, }
Cattaraugus County, } *ss:*

John T. Baxter, being duly sworn, deposes and says he is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN T. BAXTER.

Sworn to before me this 29th day of September, 1885.

E. F. KRUSE,
Notary Public.

SUPREME COURT, CATTARAUGUS COUNTY.

JOHN T. BAXTER
ag'st
THE BROOKLYN LIFE INSURANCE COMPANY.

Case and Exceptions.

This action was commenced on the 8th day of September, 1885, by the service of a summons.

The complaint was served on the 4th day of October and the answer on the 5th day of November, 1885. Copies of the summons, complaint, and answer are contained in the judgment-roll.

The issues joined in this action came on to be tried before the Honorable Albert Haight, one of the justices of this court, at a circuit court held in and for the county of Cattaraugus, on the 12th day of September, 1886.

A jury was called and sworn, and the plaintiff, by his counsel, opened the case.

The plaintiff, to maintain the issue on his part, offered in evidence a policy of insurance, dated the 24th day of May, 1884, issued by the defendant on the life of Joel J. Matteson, payable to Maria Matteson, and the same was received in evidence. A copy of said policy is hereto annexed and marked Exhibit "A."

The plaintiff then called as a witness MARIA MATTESON, who, being duly sworn, testified as follows:

I reside in McKean county, Pennsylvania. Joel J. Matteson was my husband. He lived at Dayton, in Cattaraugus county, 1884. There was a time in 1884 when he went to Pennsylvania. I really do not remember what time it was. He went there before I was acquainted with him. *I was married to him ten years ago, the twenty-seventh of May. In* 1884 *he lived in Emporium, McKean county. He died on the 6th day of September,* 1884, *at the town of Bradford. He was complaining all through the month of August.* He went down to the mill and hurt himself. From the middle of August up to the time of his death he was confined to his bed, and during such time he was unable to transact any business; did no business during that time. He was buried in Smith-

port. *I was present at the time of his death and burial. He lived about ten miles from the city of Bradford,* but in the township of *Bradford,* in *Pennsylvania.*

Counsel shows paper to witness.

Question. Is that your signature?
Answer. Yes, sir.

Counsel for the plaintiff offered in evidence the paper referred to, the same being an assignment and transfer by the witness to the plaintiff of the cause of action mentioned in the complaint; which assignment bore date prior to the commencement of this action, and the same was received in evidence.

The counsel for the plaintiff here rested.

The counsel of the defendant then moved for a nonsuit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium stipulated to be paid by the terms of the policy on the 24th day of August prior to the death of the insured.

The motion was denied; to which decision the counsel of the defendant then and there duly excepted.

It was stipulated in open court by both parties to the action that there is due on the policy $3,177.09, for which sum the plaintiff is entitled to a verdict if a recovery can be had in his favor.

The court then directed the jury to find a verdict in favor of the plaintiff for the sum of three thousand one hundred and seventy-seven dollars and nine cents.

To which direction the defendant's counsel then and there duly excepted.

The jury, as directed, found a verdict in favor of the plaintiff for $3,177.09.

The court then ordered that the exceptions so taken be heard in the first instance at the general term, and that judgment be suspended in the meantime; that the defendant have sixty days to prepare and serve case, and that if made and served that the stay continue until the hearing and decision of the motion at general term.

All the evidence and proceedings had upon the trial are above stated.

WILLIAM H. FORD,
Defendant's Attorney, No. 51 Liberty Street, New York.

EXHIBIT A.

The Brooklyn Life Insurance Company of New York.

(Vignette.)

Amount, $3,000. Quar. prem., $20.97.
No. 21839. Age, 35 years.

By this policy of assurance, in consideration of the application for this policy, and of each of the statements and agreements made therein, and under the conditions and limitations hereinafter specified, promise to pay to Maria Matteson, wife of the person hereby insured, for her sole use, if living, and if not living, to the children of said person or their guardian for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of the person hereby insured, the sum of three thousand dollars, at the office of said company, in the city of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of this policy of Joel J. Matteson of *Bradford*, in the *county* of *McKean*, *State* of *Pennsylvania*.

Subject to the following conditions and limitations:

1st. The quarter-annual premium of twenty dollars and ninety-seven cents shall be paid in advance on the delivery of this policy and thereafter on the twenty-fourth day of August, November, February, and May, in every year, during the continuance of this contract.

2d. If any statement in the application be untrue, or if the insured shall engage in any unlawful occupation, or (unless by written permission of the company) in any occupation forbidden on the back of this policy, or if he shall be convicted of felony, or in case he shall die in consequence of violating law, or by his own act, whether sane or insane, or from the effects of the intemperate use of stimulants or narcotics, this company shall not be liable for more than the next reserve for this policy at the time of death, computed according to the American experience table of mortality, with four and one-half per cent. compound interest.

3d. This policy shall be void if any premium or part of a premium be not paid when due; but if such forfeiture

shall occur after three full years' premiums have been paid, the company will issue a paid-up whole life policy, in accordance with the provisions of chap. 347 of the Laws of 1879 of the State of New York, provided this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above.

4th. The provisions and requirements printed by the company upon the back of this policy are hereby referred to and accepted as part of this contract as fully as if they were recited at length over the signatures hereto affixed.

But it is specially agreed that if the death of the insured shall take place after three years while this policy is in force, and not in consequence of any unlawful act or forbidden occupation, then in no such case shall the full liability of the company under this policy be disputed.

In witness whereof the Brooklyn Life Insurance Company have, by their president and secretary, signed and delivered this contract, at the city of New York, in the State of New York, this twenty-fourth day of May, one thousand eight hundred and eighty-four (1884).

W. M. COLE, *President.*

WM. DUTCHER, *Secretary.*

Printed on the back of said policy and referred to therein is the following provision:

6th. This policy is a contract, made and to be executed in the State of New York, and shall be construed only according to the laws of that State, and no suit shall be brought against the company upon this policy, except in the courts of that State, or in the circuit or district courts of the United States, nor shall any such suit be brought after the lapse of one year from the time when the cause of action accrues.

STATE OF NEW YORK:

COURT OF APPEALS.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of answer made from a printed

copy thereof submitted and filed on the argument of the case of John T. Baxter ag'st The Brooklyn Life Insurance Company, in the court of appeals, on the 29th day of January, 1890, now bound up and contained in volume No. 8 of cases and points for the year 1890, and on file in this office, and that the same is a correct transcript therefrom.

It witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this tenth day of November, A. D. 1899.

[Seal State of New York Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

SUPREME COURT, CATTARAUGUS COUNTY.

JOHN T. BAXTER
ag'st
THE BROOKLYN LIFE INSURANCE COMPANY.

The defendant answers the complaint of the plaintiff:

I. The defendant denies the following allegations of the complaint: That it was agreed on the part of the said Joel J. Matteson that in consideration of the issuance of said policy and the making of said agreement on the part of the defendant he would pay to it during his lifetime the sum of twenty dollars and ninety-seven cents each quarterly year, and that up to the time of the death of said Joel J. Matteson the said insured had made the payments upon said policy as agreed with the defendant, and that the sum of three thousand dollars came due and payable before the commencement of this action. The defendant has no knowledge or information sufficient to form a belief whether the said Maria Matteson made the assignment to the plaintiff alleged in the complaint.

II. The defendant, for a separate defense to this action, alleges that on the 24th day of May, 1884, the defendant, on the application of said Joel J. Matteson and Maria Matteson, by its certain policy of insurance, in consideration of the application for said policy and of each of the statements and agreements therein contained and under the conditions and stipulations thereinafter in said policy specified, did promise to pay to Maria Matteson for her sole use, if living, the sum of three thousand dollars, at the office of the com-

pany in the city of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of said policy of said Joel J. Matteson, subject, however, to the following conditions and limitations, among others, to wit: That the quarter-annual premium of twenty dollars and ninety-seven cents should be paid in advance on the delivery of said policy, and thereafter on the twenty-fourth day of August, November, February, and May in every year during the continuance of said contract of insurance, and that said policy should be void if any premium or part of a premium should not be paid when due.

That the aforesaid policy and contract insuring the life of Joel J. Matteson are the same policy and contract of insurance alleged in the plaintiff's complaint in this action.

The defendant alleges that on the twenty-fourth day of August, 1884, a premium of twenty-four dollars and ninety-seven cents became due on said policy, and that the sum so due and no part thereof has been paid.

Wherefore the defendant demands judgment that the complaint in this action be dismissed with costs.

WILLIAM H. FORD,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

William Dutcher, being duly sworn, says he is the secretary of The Brooklyn Life Insurance Company, the defendant in this action, and that the foregoing answer is true to the knowledge of this deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WM. DUTCHER.

Subscribed and sworn before me this 5th day of November, 1885.

JOHN W. JENKINS,
Notary Public, N. Y. County.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Nos. 452, 453, 454.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR AND PETITIONER,

vs.

COHEN.

SAME *vs.* HILL.

SAME *vs.* SEARS, EXECUTRIX, &C.

Supplemental Brief of Defendant in Error, Filed by Leave of Court.

I.

THE DEFENSE OF ESTOPPEL, WAIVER, OR ABANDONMENT CANNOT PREVAIL AGAINST THE BENEFICIARIES.

There is no such defense pleaded in the Cohen case.

It is not claimed that Mrs. Hill and the Hill children, beneficiaries, made any statement or did anything that estops the children from maintaining the suit. In the Hill

case the children, ever since the death of their mother, have been and are the real parties in interest. Prior to the death of Mrs. Hill she, and at all times the children, had the right to pay the premiums at any time before default. Ever since the issuance of the policy it has been their contract and not Mr. Hill's. We have shown in our principal brief that under the decisions of the highest court of New York the premiums were not due until thirty days after the service of the statutory notice. There is no claim made that Mrs. Hill and the children did not have the right to pay the premiums; nor did any of them at any time state that they could not or would not pay them. Then, so far as they are concerned, the policy was never forfeited, nor were they ever placed in default. If the alleged agreement of Mr. Hill and the insurance company is good, or if his statement amounts to an estoppel, then the contract was ended at once at the time the alleged agreement or the estoppel took place, and the beneficiaries had no opportunity to pay thereafter, whereas the statute gave them at all times a minimum of 30 days in which to pay. Suppose Mrs. Hill had assigned the contract to secure a debt (leaving out for the purpose of the suggestion the minor heirs of Mrs. Hill), then under the statute the notice must have been served on the assignee. Mrs. Hill was the only party who could assign the policy. It is needless to say in such a case that any declaration or statement that Mr. Hill might make thereafter could not bind Mrs. Hill or the assignee, because each would have the right to pay the premium before default; nor could any declaration of the assignee as to the payment of the premium or the waiver of notice bind Mrs. Hill, though he would be the party upon whom such notice must be served. Mrs. Hill would still have the right to pay the premium; yet her right to pay the premium after assignment was no greater than her right to pay the premium before the assignment, and the declaration of the assignee would no

more bind Mrs. Hill after the assignment than the declaration of Mr. Hill before the assignment. Our contention along this line is fully supported by all of the authorities. The case of Pingrey against the National Life Insurance Company, decided by the supreme court of Massachusetts, 144 Mass., 381, fully supports our contention. In that case the court said:

"There appears to have been a full understanding between him (the assured) and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact it was made payable to her, and this was done with the intention of giving her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might, indeed, afterwards fail to pay the annual premiums. This, however, does not prevent it from being a good trust. 'An unrevoked trust is valid, even though there is an express power of revocation' (Stone *vs.* Hachett, 12 Gray, 227). In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two annual premiums, it would not lapse, and certain valuable rights would still exist under it. Under the circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority."

To the same effect is Bacon on Insurance, vol. 1, section 292, which cites the above case with approval. The supreme court of Mississippi, in the case of Granger Insurance Company against Brown, 57 Miss., 308, 315, sustains the rule in this language:

"The insured in such a case is not a party to the record, has no interest in the policy, and, if he is to be considered the agent of the beneficiary in procuring it, his agency

ceases with its issuance, so that there is no legal ground upon which his statements can be received."

Mr. Justice Brewer, in the opinion delivered by him in the supreme court of Kansas, Washington Insurance Company *vs.* Haney, 10 Kansas, 395, 403, uses this language:

"The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not a party in interest, as the whole benefit and interest insured to the assured. She is not an agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him."

This point has also been decided by the court of appeals of New York. In that case the policy by its terms became lapsed, and subsequently thereto the husband took out another policy, payable to a different beneficiary. The company defended on the ground that the original beneficiary had no standing in the court, because the original policy had become lapsed by its terms and her rights thereunder were thus ended; but the court says:

"It is not quite true that a failure of the wife to pay the premiums from year to year as they become due will work this result. The statute, unless waived in writing (the court should have said in writing, *in red ink*, on the face of the policy; see chapter 347, Laws of New York, 1879) on the face of the policy, provides that after the lapse of three years the reserve value of the policy, computed according to certain principles, is to be taken as a single premium of life insurance, at the published rates of the company, at the time the policy was issued, and must be applied either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance of that amount at the age of the insured at the time of lapse, or to the purchase upon the same life, at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to payment of premiums, as the original policy (chapter 347, Laws

1879). *And no policy can be declared or treated as lapsed or forfeited until* 30 *days after notice to the policy-holder.*"
Stokes *vs.* Ammerman, 121 N. Y., 337, on p. 323.

A case also from the court of appeals of New York stated this proposition in the following language:

"His was the life insured, but the contract was not with him except as trustee for his children, and as representing them. He took upon himself this office and duty with the full knowledge and assent of the company on the one hand, and the beneficiaries on the other. Every premium paid by him continued to be an act as trustee and agent for the children, and he could not shake off that character and duties without their consent, except in one way. He might omit or refuse to pay a maturing premium, and so suffer the policy to lapse; but the children were at liberty to pay it, though he should refuse, and if they did, the contract would remain valid as at first, and suffer no injury or destruction from his refusal to pay, or to further act as his children's trustee. These children thus had a vested interest in the policy, increasing in value yearly with every payment of additional premium. That interest was measured and represented by its surrender value, which was never the property of John Lindemann in any other sense than as the trust property of the children created by his act as trustee. He could not deal with it in contravention of their rights, especially with one fully apprised of those rights, and of his position and duty as trustee." * * *

"Assuming that by the policy John Lindemann was trustee for the children, it is insisted that the trust was revocable at the option of the trustee and was so far executory as to be capable of revocation; but I think it is a mistake to assume that the trust was wholly executory. It had been to a large extent executed. Every payment of premiums for 15 years had steadily added to the value of the policy as the property of the beneficiaries. The day of final payment grew nearer and the burden of premiums decreased steadily in number. Each payment made added to the surrender value and fully executed the gift to the extent of that value. What the insured had done for the benefit of the assured he could not undo without their consent, nor take from them

what was already theirs and destroy the trust so far as executed."

Garner *vs.* Germania Life Ins. Co., 110 N. Y., 266; 18 N. E., 131, 132.

The following cases fully support us in our claim (Cohen brief, page 6):

Frank *vs.* Hume, 128 U. S., 206, 207.
Glanz *vs.* Gloeckler, 104 Ill., 573.
Gould *vs.* Emerson, 99 Mass., 155.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Whitehead *vs.* Ins. Co., 123 N. Y., 156.
Ins. Co. *vs.* Smith, 44 Ohio St., 146.
Garner *vs.* Ins. Co., 110 N. Y., 266.
Pilcher *vs.* Ins Co., 33 La., 322.
Pingrey *vs.* National Ins. Co., 144 Mass., 374.
Bayse *vs.* Adams, 81 Ky., 368.
Weisert *vs.* Miehl, *id.*, 336.
Wilmaser *vs.* Continental Life Ins. Co., 86 Iowa, 417.
Allis *vs.* Ware, 28 Minn., 166.
City Savings Bank *vs.* Whittle, 63 N. H., 587.
Hooker *vs.* Sugg, 102 N. C., 115, 120.
Conn. Mut. *vs.* Baldwin, 15 R. I., 106.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Kline *vs.* National Ben. Ass'n, 111 Ind., 462.
Splawn *vs.* Chew, 60 Tex., 532.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Waldron *vs.* Waldron, 76 Ala., 285.
Supreme Lodge *vs.* Schmidt, 98 Ind., 374.
(For fuller discussion of case last cited see Hill brief.)

The law seems to be well settled that the insured cannot, to the prejudice of a beneficiary, surrender (even for value received) a live policy. It is claimed that Hill and Cohen surrendered the policies, but with the claim is coupled the

admission that at the time of the alleged surrender no statutory notice had been mailed. It follows, under the express provisions of the statute and the uniform current of decisions, notably the New York cases, that at the time of the alleged surrender the Hill and Cohen policies were live policies, and no premium was *in default*. Therefore the alleged surrender was ineffectual as to the beneficiaries.

The law seems to be also well settled that the beneficiaries were entitled to pay any premium. The statute gave them thirty days after mailing of notice within which to exercise this right. At the time of the alleged surrender (whenever it may have been) the beneficiaries had thirty days after a notice shou'd thereafter be mailed in which to pay. (As the notice was never mailed, the thirty-day period never commenced to run, whereas if the notice had been mailed immediately upon the alleged surrender, they would have had only thirty days.) It would seem logically to follow that the surrender did not cut off this right of the beneficiaries, nor cut short the time for its exercise, and therefore the policies remained subsisting thereafter and up to the time of the death.

We deny that the answers allege a surrender, and submit that the most that can rightfully be made out of the allegations is an *intention to abandon or surrender*, accompanied by what plaintiff in error claims to be facts of inducement, reliance, and injury, but which, we assert, omits at least two (in the Sears case, three) of these necessary elements of an estoppel. An abandonment or surrender must have the two ingredients, viz., intention to abandon or surrender and the act of abandonment or surrender. In the one case discussed the two—intention and act—are supposed to have been coincident. In the other, the intention is supposed to have existed and been declared at one time, the act never to have taken place, but the insured and beneficiary to be estopped to deny it. Certainly, if an actual surrender

would have been ineffectual against the beneficiaries, the alleged estoppel is.

II.

ESTOPPEL.

Under the act of 1877 the statutory notice might precede or follow the due date. The waiver in the policy is of both or either. These notices can (for brevity) be termed, respectively, *advance* and *subsequent*.

a.

The waiver in the policy is ineffectual as to any future notice *of either kind*.

The Clements case, opinions by Brewer, J., and by this court, cited in main brief, page 37, where see other cases on the point.

b.

After the payment of a premium and before the next due date, a statement of the insured, oral or written, waiving all future notices of either kind would be likewise ineffectual.

c.

Under like circumstances a like waiver of some particular future notice of either kind would be likewise ineffectual.

d.

Under like circumstances a like waiver of the next *advance* notice would therefore be ineffectual.

e.

Under like circumstances a like waiver of the next *subsequent* notice would be ineffectual.

f.

After the first premium on the Sears policy was passed, the policy was, nevertheless, under the New York statute, a live, subsisting policy, and the insured was not in default. Under such circumstances, would his waiver, oral and written, of the next advance notice be effectual? It is respectfully submitted that the proposition under this head is not different from that under *d*, above. In each case the policy was a subsisting contract and the insured not in default.

g.

Under the state of facts supposed in *f*, the company might give a subsequent notice on account of the passing of the first premium. The non-compliance with the notice would have given the company the right by statute to declare the policy forfeited or lapsed. Could the company use the waiver to accomplish the same result? We say no, and give our reasons in the way of an illustration. Let us suppose that Sears passed the first premium (due date thereof, May 16, 1893), the company not having given the advance notice relative thereto. The company might then have given the subsequent notice. Instead of doing so the company opened correspondence with him, or sent an agent to interview him, with the purpose of persuading him to pay the premium. In answer, he refused to pay; stated that he did not intend to pay that premium; that he did not intend to pay any premium; that he intended to abandon the policy, and "elected to have it terminated." Notwithstanding these statements, the company failed to give the subsequent notice. Let us suppose, further, that Sears died during the year; his executrix sued upon the policy; the company defended on the facts aforesaid, claiming thereby that the policy was lapsed. This would be an attempt on the part of the company to have the policy adjudged to have

lapsed by virtue of the estoppel, claiming to have withheld the notice because of the statement of the insured aforesaid. It is just such attempts that the statute forbids. The statute reads:

"No policy shall be forfeited or declared forfeited *or lapsed* until the expiration of thirty days after the mailing of such notice."

The effect of the plea is that the policy is lapsed, not by the exclusive method provided by the statute, but by a substitute method. In considering this proposition it should be borne in mind that at the time this supposed statement was made (whenever that time was) the policy was a subsisting contract, and the insured had at least thirty days in which to pay, on any one of which days he had a perfect legal and moral right to change his mind and pay, and such change of mind could not have prejudiced the legal rights of the company. It should also be borne in mind that this period was not limited in the supposed case to thirty days, but extended for thirty days after the said subsequent notice or any future advance or subsequent notice should be given. So we think it is clear that if the passed premium had been the first (due date thereof, May 16, 1893) and Sears had died during the year, the defense would be held insufficient. The same result would seem to follow logically if we supposed a case wherein two premiums are passed, or even three, four, or five.

On the argument it was suggested from the bench that perhaps the fact that as many as five premiums were passed would be sufficient showing of the actual abandonment of the policy. We argued then, as we do now, that the facts alleged in the answer in the Sears case did not go so far as to plead the actual accomplishment of the abandonment, but only the declaration of the intention to abandon, followed by a failure to pay for the length of time, as to the length of which time the court must remain in igno-

rance, owing to the indefiniteness of the answer in that respect. If we supposed the length of time to have been the longest possible period, to wit, between four and five years, nevertheless we respectfully submit that the length of this period of inaction cannot rightfully be said to make a sufficient showing to constitute the act of abandonment, but rather to make more certain the intention to abandon. Abandonment, as before stated, must combine the act with the intention. There is no allegation that the policy was surrendered up or canceled. Add to these considerations the fact that it is nowhere alleged that the statements were designed to induce the company to withhold any notice; that there is no allegation that the company was induced by them to withhold any notice; that there is no allegation that the company altered its condition or changed its course of conduct in reliance upon the statement, and the further vital fact that it does not appear from the answer but that the statements may have been made at a time when, if the company had not acted upon them, but had at the earliest possible moment given a notice, the notice itself would have kept the policy alive for the period extending beyond the day of the death of Sears—taking all these things into consideration, the conclusion seems irresistible that the facts do not constitute a defense to the action upon the policy. In this connection the court is asked to notice its opinion in the Mowry case, 96 U. S., 547 (main Brief, p. 71).

The court there said that a declaration of an intended abandonment of an existing right would have the effect of an estoppel " if the party, who by his statements as to his intended abandonment of existing rights, *designedly* induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements or enforce his right against his declared intention of abandonment."

III.

THE ACT OF 1897.

a.

On the question of power of the legislature by a subsequent act to withdraw the previous statutory requirement of notice, we wish to recall the court's attention to the Carter case (110 N. Y.) in its relation to the Rosenplanter case. The circuit court of appeals bases its decision in the Rosenplanter case largely upon the decision of the New York court of appeals in the Carter case, assuming that the New York court had held thereby that such legislation was competent. The constitutional question did not arise in the Carter case, and could not do so, owing to the facts in the case as they appear from the opinion. Carter lived in Georgia and up to the time of the passage of the first anti-forfeiture act had uniformly paid his premiums in Georgia. Upon the passage of the act the company sent him a copy of the act, with the statement indorsed thereon that thereafter the company would send the notice referred to in the statute, and that thereafter the insured must pay his premiums in New York. Here was an adoption by the company, as applicable to the policy, of the New York statute. Acting on the suggestion made in this communication, Carter for a number of years thereafter remitted his premiums to New York, thereby accepting on his part the company's offer to bring the policy under the act.

b.

The entire argument of counsel for plaintiff in error in their supplemental brief upon the question relating to the act of 1897 is based upon the assumption that the legislature by the act of 1897 intended to do away with statutory

notice, past and future, as to all existing policies held by persons having no post-office address in the State of New York, and this assumption involves the further one that the act of 1897 absolutely repeals all provisions as to statutory notice to holders of existing policies having no post-office address in the State of New York.

That the legislature should not be said to have so intended is, we think, very clearly pointed out in our main brief. (In this connection attention of the court is called to the fact that some additional discussion of the act of 1897 is contained in our Cohen brief.) It should be remembered that it is an admitted fact that Sears lived and died in the State of Washington, and it was admitted in the oral argument that Sears had at no time a post-office address in the State of New York, and we claim, with all deference to counsel, that it is most illogical for them to argue that the year limitation periods created by the act of 1897 applied to the Sears policy, and at the same time that the act of 1897 repealed, as to the Sears policy, all previous statutory provisions as to notice.

IV.

In the discussion contained in the supplemental brief of the plaintiff in error under *Point IV*, wherein it is asserted that all questions arising under the act of 1897 are open to discussion and determination in this court, the *right* of this court to consider those questions is alone discussed. In our principal brief and now we argue:

First. That, as a matter of right, the court should not consider them; and,

Second. That if it be otherwise, nevertheless the court, having taken this case by virtue of a discretionary power, should not exercise its discretion for the purpose adjudicat-

ing a point in the case which was not submitted to the circuit court of appeals.

V.

The questions presented in this case were so many, so varied, and so interesting that is was impossible for them to be satisfactorily covered in the oral argument. The brief of the defendant in error is especially full and complete on the question of estoppel, subsequent waiver, and abandonment. We invite attention of the court to the discussion therein of those questions particularly.

Respectfully submitted.

STANTON WARBURTON,
Attorney for the Several Defendants in Error.

HAROLD PRESTON,
Of Counsel in the Sears Case.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by their guardian EBEN SMITH, and ELIZA MAUD HILL in her own behalf, Defendants in Error.

BRIEF OF PETITIONER.

STATEMENT.

The Mutual Life Insurance Company of New York, a corporation chartered as such by special act of the Legislature of the state of New York, in April, 1886, insured the life of George Dana Hill by a policy in the sum of twenty thousand dollars on the ordinary life plan. At the time of taking the insurance Hill was a resident of the city of Seattle and a citizen of the state of Washington. The insurance company had complied with the laws of the then territory, now state, of Washington, requiring any foreign corporation transacting business therein to file with the Secretary of State a copy of its articles and to appoint an agent in its principal place of business in the territory. The statutory agent was also the general agent

of the insurance company in the state, then territory, representing it in the conduct of its business therein. (Record, p. 16; Petition, p. 4.) The insurance company also had a general office at San Francisco, for the conduct and management of its affairs on the Pacific Slope. The application for insurance and the physical examination of the applicant were made at Seattle. The application was delivered to the agent of the company and by him transmitted to the general agent at San Francisco, who transmitted the same to the home office in New York, and in due course the policy of insurance was issued and transmitted by mail to the agent at Seattle, where upon payment of the first annual premium of $814 the policy was delivered to George Dana Hill. (Petition, p. 5.)

The laws of the state of Washington confer upon foreign corporations authority "to do and perform every act and transact every kind of business within this state, in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state." (Petition, p. 3.)

The application for insurance and the endorsements upon the policy were made parts of the contract. In the application there was a stipulation and condition to the following effect: "And it is agreed that there shall be no contract of insurance until the policy shall have been issued and delivered by the said company and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application; and that if said policy be issued, the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York." (Petition, p. 4; Record, p. 8.)

Among the endorsements on the policy is the following: "Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such premium is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived." (Petition, p. 9.)

George Dana Hill continued to reside at Seattle, Washington, from the date of his application until his death, December 4, 1890. (Petition, p. 4.) No premium was ever paid subsequent to that paid upon the delivery of the policy. The agent of the insurance company both in writing and personally notified Hill of the time the second annual premium fell due, and at that time offered the receipt of the company, duly signed by its president and secretary, in case the premium was paid. (Petition, p. 10; Record, p. 22.) Hill declined to make payment, informing the agent of the insurance company that he was unable to do so, and further informed the agent that he not only was unable, but did not intend to make payment of the premium then due or any thereafter accruing, but that it was his purpose to allow the policy to lapse and become forfeited for want of payment. The agent returned the receipt to the home office, and the company acting upon the faith of these representations, noted and entered the policy as lapsed and forfeited upon its books, and relying upon such representations abstained from giving or mailing any further notice of the due date of premiums to the insured. After the death of the said George Dana Hill this action for the recovery of the amount of the policy was begun in 1895, in the Circuit Court for the District of Washington, Northern Division. The complaint set

up the application and policy of insurance and the endorsements upon them which were made part of the contract of insurance. Performance by insured of the conditions of the contract was averred, but controverted by the company.

The statute of New York of 1876 provides:

"No life insurance company doing business in the state of New York, shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where the said premium or interest shall be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company at his or her last known postoffice address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium." (Petition, p. 2.)

The amendment of 1877 to this act has the following provision:

"The affidavit of any one authorized by Section 1 to mail such notice that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company in pursuance of said section, shall be presumptive evidence of such notice having been given." (Petition, pp. 2 and 3.)

The Mutual Life Insurance Company as a first defense to the policy affirmatively alleged the neglect and refusal of the insured to pay the annual premium of $814 due April 29th, 1887. (Record, p. 19; Petition, p. 7.)

As a second affirmative defense it set up that at a time more than one year after the issuance of the policy it was agreed

between the insured Hill and the company that the contract should be waived, abandoned and rescinded, and that the parties then by mutual consent waived, abandoned and rescinded the same. Record, p. 20; Petition, p. 8.)

As a third affirmative defense, it was alleged that The Mutual Life Insurance Company had complied with the laws of the state, then territory, of Washington in respect to foreign corporations transacting business therein, and had appointed a statutory agent pursuant to the laws of said state, and was transacting business therein, with its principal office at Seattle. That shortly prior to the 29th day of April, 1886, George Dana Hill, who was then a resident of Seattle and a citizen of the territory, applied to The Mutual Life Insurance Company for insurance. That at Seattle, Washington, upon the payment of $814 as the first premium, the insurance company delivered to him the policy on his life in the sum of $20,000, of date April 29th, 1886. That the policy contained the following provision: "Each premium is due and payable at the home office of the said company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary." And that it was, upon the delivery of the policy at Seattle, Washington, to said Hill, mutually agreed between the insurance company and the said Hill that all annual premiums subsequent to that paid at the time of the delivery of the policy should be paid to the insurance company at the city of Seattle, and the duly signed receipt of the insurance company should at the time of such payment be delivered to Hill at Seattle. That shortly prior to and also upon the 29th day of April, 1887, at Seattle, Washington, the insurance company both in writing and personally through its agent, notified and informed the said George Dana Hill, at the city of Seattle, that the premium of $814 was due

and payable April 29th, 1887, and on that day duly demanded payment of the premium in said sum, and at the same time and place tendered the receipt of the insurance company duly signed by its president and secretary. That said Hill, being so informed and advised in the premises, refused to make payment of the premium, or any part of it, and then and there, for the purpose of inducing the insurance company to rely upon the same, informed it through its said agent that he was unable to pay said premium and did not intend to make payment thereof, nor of any premium thereafter to accrue upon said policy of insurance, but on the contrary he, the said Hill, intended to allow the said policy to lapse and become forfeited for refusal of payment of the premium then due and of every premium afterwards accruing upon the policy. That shortly thereafter the said Hill made similar statements to the agent of the insurance company, who thereupon returned the receipt to the home office and advised the company of the representations and conduct of Hill, and it was thereby induced to note and enter the policy as lapsed and forfeited; and relying upon said representations and conduct declared the policy forfeited and abandoned; and further relying upon the conduct and representations of said Hill, the insurance company was induced to and did abstain from giving or mailing any other notices concerning the payment of any premium. (Record, pp. 20-23; Petition, pp. 9 and 10.)

A demurrer to the entire answer and to each defense was sustained. (Record, p. 26; Petition, p. 11.) The Mutual Life Insurance Company standing upon its pleadings and declining to plead further, judgment was entered January 18th, 1899, against it and in favor of defendants in error for $24,086.61, with interest and costs. A writ of error was issued out of the Circuit Court of Appeals for the Ninth Circuit, and on October

2nd, 1899, the said Circuit Court of Appeals affirmed the judgment of the Circuit Court.

Upon the foregoing abbreviated Statement of Facts, which are more fully set forth in the petition for certiorari, the petitioner asks this court to grant a writ of certiorari.

ARGUMENT.

We present the following reasons why a writ of certiorari should be granted by this Court under Section 6 of the Act of March 3rd, 1891, (*26 Stats. at Large, 826*) requiring the record and cause to be sent up to this Court for its consideration:

THE STATUTE OF NEW YORK RELATING TO FOREIGN CORPORATIONS TRANSACTING BUSINESS IN THAT STATE IS NOT OPERATIVE BEYOND THE STATE OF NEW YORK.

By the terms of the statute it applies alike to foreign and domestic corporations. Its language is: "No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy." The language employed respecting the foreign corporation measures the authority assumed as to the domestic corporation. It is a regulating statute as to business done in the state of New York and not beyond its boundaries. It is a statute outside of the contract of insurance, recognizing the contract as being complete in itself, independently of the statute. The further provision that proof of the sending or mailing of the notice may be established by the affidavit of an officer of the corporation, which shall be presumptive evidence that such notice was given, demonstrates that the statute was one designed to operate upon persons within the state of New York.

"The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given."

(Petition, pp. 2 and 3.)

It is not within the competency of the legislature of one state to enact rules of evidence for the use of another state or government.

Wharton, in his Conflict of Laws, says (Sec. 752, 2nd Ed.):

"There can be no question that the *lex fori* is also to determine the competency and weight of evidence adduced to prove a litigated case. * * * On the one side, every case must be governed by the law in which it has its seat. On the other side, the court, in which such case comes to be tried, must direct its own procedure."

In 2nd Parsons on Contracts, 7th Ed., p. 718, the rule is thus stated:

"But on the trial, and in respect to all questions as to the forms, or methods, or conduct of process, or remedy, the law of the place of the forum is applied."

It is thus seen the statute is one of public policy for the state of its enactment, establishing rules of evidence to be applied so far as the law itself extends. The conceded object of this statute is to relieve the negligent and improvident policy holder from the consequences of his carelessness in failing to pay the premiums upon his policy as they fall due. Taking into consideration the date of the enactment of the statute, 1876, and the condition of the mail service throughout the United States at that time, the period of thirty days fixed as sufficient for advising the holder of a policy of the due date of his premium

and affording him opportunity of making payment of the same at the home office in New York City, would render the statute effectual for the purpose for which it was designed, if limited to the state of New York, but totally ineffectual, for practical purposes, if extended to all other parts of the United States. It will not be presumed that the legislature recognizing the evil to be remedied, would stop short of an ample relief.

THE STATUTE OF NEW YORK DOES NOT ENTER INTO THE CONTRACT OF INSURANCE, NOR INTO THE CHARTER OF AN INSURANCE COMPANY CREATED UNDER THE LAWS OF THAT STATE.

It is manifest the contract of insurance is complete without reference to this statute. The statute left the parties free to make such contract as they saw fit. No limitation is placed upon their right of contract. It is not until a breach has occurred in the non-payment of premium that the statute becomes applicable. It is against the consequences of a breach of the contract that it purports to afford relief. The legislature is at liberty to repeal such statutes without disturbing vested rights. If enacted, they come by way of grace; if repealed, they leave the parties standing upon their contracts as they have seen fit to enter into them.

In *Rosenplanter v. Provident Savings Life Assur. Soc. of New York*, 91 Fed., 728, Hammond, J., speaking of this statute and others of the same nature, says:

"They are not statutes of contract, but remedial statutes; and as to these the rule is that they are not a part of the obligation of the contract. It is not because of the effect of either of these statutes that we have under consideration that the plaintiff or the beneficiary has not incurred a forfeiture strictly according to the terms of the contract, but only that the legislature of New York, having authority over contracts made within the state of New York, has relieved her against a forfeiture so far as the statutes apply, but no further. One who grants a bounty may

withdraw it; and it is a mistake to suppose that the right to it becomes perpetual because it has once been granted, where the nature of the gift is such that it must recur from time to time."

In affirming the case of *Rosenplanter v. The Provident Savings Life Assurance Society of New York* (96 Fed., —), the Circuit Court of Appeals meets the question as follows:

"But the very zealous and learned counsel for the beneficiary have very strongly urged that as this contract was made while the act of 1877 was in force, the provisions of that act became so incorporated into the contract as to become a part of the contract itself, and that the provisions of the act of 1877, prohibiting a forfeiture of the interest of the insured in the policy without a notice according to the terms and conditions of the statute, became as much a term and stipulation of the policy as if inserted therein by the parties themselves. Upon this assumption, they insist, that the act of 1877 could not be altered, or amended, or repealed, so as to subject the contract to forfeiture without the statutory notice, as such repeal or amendment would impair the obligation of the contract.

"To this we cannot agree. The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy without more ado. So with respect to the payment of the second half of the yearly premium; if not paid when due, the contract was thereby terminated. The act of 1877 interposed and for the benefit of the insured provided, that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. * * *

"Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as laws impairing the obligation of contracts or as an

impairment of vested rights. *Conn. Life Ins. Co. v. Cushman,* 108 U. S., 51-65; *Ewell v. Daggs,* 108 U. S., 143; *Gross v. United States Mortgage Co.,* 108 U. S., 477; *Butler v. United States B. & L. Ass.,* 97 Tenn., 679; *Curtis v. Leavitt,* 15 N. Y., 15, 85; *Lewis v. McElrain,* 16 Ohio, 347; *Trustees v. McCaughy,* 2 Ohio St., 152; Cooley, Const. Lim., sides pages 293-378.

"Judge Hammond, who heard this case below, very admirably answered the argument that the act of 1877 so entered into the contract as to make its repeal an impairment of its obligations, by saying:

" 'If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and of course the law could not make another contract for them. Wherefore, it would be enforced by the courts as the agreement of the parties; but the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice as required by the act of the non-payment of premiums before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract which it was entirely competent for the legislature to withdraw, alter or amend, as to it might seem best.

" 'Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel. That is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but if the legislature has the power to import

into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary.' "

In the case of *Ewell v. Daggs,* 108 U. S., 143, it was held that the repeal of the statute of Texas which made contracts void for usury, acted retrospectively and took away the right of the defendant to make the defense of usury, but that such a repeal was not legislation impairing the obligation of contracts. Mr. Justice Matthews uses this pertinent language:

"The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. * * *

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri,* and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract." (pp. 150-151.)

In *Gross v. U. S. Mortgage Co.*, 108 U. S., 477, construing a statute which gave validity to a contract otherwise invalid, this Court, through Mr. Justice Harlan, says:

"When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt."

It is thus seen the statute of New York does not enter either into the contract of insurance or the charter of the insurance company. The statute being one of remedy and of public policy, cannot extend beyond the borders of the state of New York. If it enters into a contract made outside of New York or comes by way of remedy for its breach, it does so as a stipulation of the parties, and not by the authority of the legislature. By the terms of this policy it did not become a contract until it was delivered at Seattle where the first annual premium was paid. This marks the radical difference between business done or a contract made by the insurance company in the state of New York and outside of that state. In the one case the policy of the law which is omnipotent, enters into the contract and controls the parties to it, while in the other, neither the statute nor its policy have a place, and therefore, as a statute and as a policy, it cannot enter into the contract or transaction.

IN VIEW OF THE UNCERTAINTY OF THE DECISIONS AS TO THE LAW CONTROLLING THE PERFORMANCE OF CONTRACTS LIKE THE ONE IN CONTROVERSY, THE OPINION OF THIS COURT WILL BE OF PUBLIC IMPORTANCE AND TEND TO SECURE UNIFORMITY OF DECISION.

The court adopted the view that the policy was a New York contract and its provisions were dominated and controlled by the statutes of that state relating to insurance companies, and that compliance with such statutes was indispensable to a forfeiture of the policy for non-payment of the premiums.

(Record, p. 60.)

It is true the application recites that the policy was to be deemed a New York contract. But it stands admitted that the insurance company had complied with the laws of the state of Washington respecting foreign corporations transacting business in that state in pursuance of the laws; that it there had its agent and was there carrying on its business; that the insured was from the time of making his application to his death, a citizen and resident of Seattle; that his written application for insurance was made and delivered to the company's agent at Seattle and by him transmitted to the New York office; that the policy of insurance was transmitted to the agent at Seattle and upon payment there of the first annual premium was delivered to Hill; that the contract expressly provided that it should not take effect until "the first premium shall have been paid and the policy shall have been delivered;" that Hill, the insured, at the time of the delivery of the policy in Seattle, agreed with the insurance company that the premium receipts should be delivered to him there, upon payment of the premiums; that such receipt was presented to him when the second annual premium fell due; that he had notice in writing and

both shortly before and on the day such premium fell due, and that upon that day the premium receipt was tendered him, the premium demanded, and payment refused; that the insured, throughout his life, admitted he had not paid any other than the first annual premium; that he was aware the company had cancelled the policy for non-payment as by its terms provided; that he acquiesced in the mutual understanding that the policy was lapsed and forfeited, and consented that the company should so regard it and abstain from giving notice.

The case in each of the elements going to determine by what law the contract should be governed, is substantially like that of *Equitable Life Assurance Society v. Clements 140 U. S., 226*, where Justice Gray summarized the case substantially as follows:

The assured was a resident of Missouri and the application was signed there; the policy was executed at the company's office in New York and provided that the contract was set forth in the application and policy taken together. The application declares the contract shall not take effect until the first premium has actually been paid during the life of the assured. The two premiums were paid in Missouri. The answer admits the payment of the premiums and the petition alleges the policy was delivered in Missouri to the assured. The opinion then proceeds:

"Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri." *(P. 232.)*

Unrestricted freedom of contract is conspicuously made manifest in this policy; whatever else may be doubtful, there is no

uncertainty left in respect to the intention of the parties in this respect. They agree that the notice contained in the policy is given and accepted by the delivery and acceptance of the policy and expressly waive any other notice, and declare the contract shall become void by non-payment of premiums. This freedom of contract was guaranteed by the law of the state of Washington where the contract was made.

In the case of *Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S., 397*, the court lays down the following rule:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country." *(P. 458.)*

The *Brantford City, 29 Fed., 373*, is forcibly in point. A contract was made at Boston with local agents of the British Steamship Company, by the terms of which libelants were to ship cattle on a British steamer from Boston, and deliver them at Deptford, England, for a freightage of eighty-five shillings sterling per head. The court says:

"2. The defendants contend, however, that, inasmuch as the cargo was taken on board of a British ship, and as the bill of lading was signed by a British master, for transportation to England, the stipulations of the bill of lading exempting the ship from liability for negligence and from loss by death, however occasioned, afford a complete defense; because such stipula-

tions are valid by the laws of England.* * * The question presented is a very important one. All the steamship lines, whether domestic or foreign, that sail from this port, insert in their bills of lading substantially the same conditions. Considering the number and the magnitude of the shipments by these lines, and the very diverse views found in the text-books and decisions upon this branch of the conflict of laws, I have deferred a decision of the cause until able to give the questions involved something, at least, of the consideration their importance demands. The conclusion to which I have come is that our law must prevail, whether the question be viewed as a question of responsibility for a tort or for the construction and validity of the exceptions in the bill of lading, in a conflict of laws; or as a question of evidence and procedure; or as a question of comity as related to our national policy."

Cox v. United States, 6 Pet., 83, 172, 203.
Scudder v. Union Nat'l Bank, 91 U. S., 406.
The Pennsylvania Co. v. Wm. Fairchild, 69 Ill., 260.
McDaniel v. The Chicago & N. W. Ry. Co., 24 Iowa, 412.

THE INSURED DID NOT KEEP THE POLICY ALIVE BY THE PAYMENT OF THE ANNUAL PREMIUMS, AND THE CASE WAS SHIFTED FROM ALLEGED COMPLIANCE WITH THE TERMS OF THE POLICY ON THE PART OF THE INSURED TO LACK OF STATUTORY NOTICE BY THE INSURANCE COMPANY.

The defendants in error alleged in the complaint that the insured agreed in the policy to pay the annual premium of eight hundred and fourteen dollars in advance on the delivery of the policy and each annual premium on the 29th of April thereafter during the continuance of the contract; that he died December 4th, 1890; that he performed all the terms and conditions of the contract on his part to be kept and performed to the date of his death. This latter allegation was controverted, and it was also affirmatively alleged that payment had never

been made of any premium subsequent to the first to the date of the death. No allusion was made in the complaint to the statute of New York.

Mr. Pomeroy in his work on Remedies and Remedial Rights, Section 556, says:

"The plaintiff is no longer permitted to aver the performance of the required act, and on the trial prove the circumstances which excuse such performance, or prove any other alternative than the one specifically alleged."

The case was shifted from alleged compliance with the contract of insurance to an unpleaded failure on the part of the insurance company to give certain notice required by the statute of New York. To have maintained a right of recovery under this statute it should have been pleaded.

Austin v. Goodrich, 49 N. Y., 266.
Churchill v. Onderdonk, 59 N. Y., 134.
Railroad Co. v. Sturgis, 44 Mich., 538; 7 N. W., 213.

THE ADMITTED FACTS SHOULD ESTOP THE DEFENDANTS IN ERROR FROM RECOVERING ON THE POLICY.

Unless the statute of New York enters into the charter of The Mutual Life Insurance Company (and we have endeavored to demonstrate it does not), then a policy holder who, through a number of years has pursued the course admitted in this case, who has, in the state of Washington, agreed that the premium receipt should be there presented to him when the annual premium fell due, and given in exchange for the payment of the premium—who admits such receipt was presented to him at the proper time and place; who also admits that notice in writing and actual personal notice was brought home to him at the place agreed upon, of the amount and time of payment of the premium—who, with such knowledge has refused to make pay-

ment, and who has informed the insurance company of his refusal to make future payments or consider the policy an existing contract, and who has knowingly consented upon the agent returning the receipt undelivered to the home office in New York, to the noting and entry of the forfeiture of the policy by the insurance company, and afterwards agreed and consented to the termination of the contract—and who has knowingly induced the company to refrain from mailing future notice—should be estopped from afterwards claiming the benefits of the contract, who has, knowing of the amount and the due date of his premium, refused to pay it—who has knowingly consented to the noting and entry of the forfeiture of the policy by the insurance company, and afterwards agreed and consented to the termination of the contract, and with that understanding has knowingly declined payment of all future premiums and induced the company to refrain from mailing notice—should be estopped from afterwards claiming the benefits of the contract. And if he, living, would be so estopped, the representatives of his estate must be also. It cannot be argued that the state of Washington has no public policy against fraud and misrepresentation and against rewarding parties for their own demerits and delinquencies. It has such a policy. It is the policy of the common law, operative wherever rules of conscience are enforced and wherever courts of justice close their doors against parties who seek to take advantage of their own wrong. The policy of the state of New York cannot be transported to Washington in order to override a policy so universal and controlling.

In *Jones v. Alliance Mut. Fire Ins. Co., 34 Atlantic (Pa.), 198*, an insurance policy provided that on non-payment of assessments after thirty days' notice, the insurer might collect the same with twenty-five per cent. additional for cost of collection, but made no provisions for a forfeiture for non-payment. Not

having paid the premiums, the insured, after the destruction of the property, brought an action to recover the amount of the policy. The court says:

"The question, then, comes down to this: Was there, or was there not, an extinguishment of exceptant's policy in defendant company by mutual consent of both parties? If it is a fact that, when the exceptant neglected to pay his assessment, his intention was and thereafter continued to be to abandon the policy; that the company acquiesced in that intention; and that, for any period of time thereafter, both understood that their relations were at an end, that the policy was dead,—such must be the legal effect given to their acts, and whether that effect be styled a rescission or a surrender or a cancellation or a forfeiture or an abrogation or anything else is quite immaterial. It certainly cannot be equitable for one of the parties to such an understanding, upon the subsequent occurrence of that which makes it desirable to him to hold the other to the original contract, suddenly to change his mind, and because of the omission to give that formal notice which either might have given, which would have put their mutual understanding beyond doubt or question; but the absence of which has not prejudiced or misled either in the least degree, to assert that the policy was still in force, and come down upon the other for performance of his part of the bargain when his own has remained deliberately unperformed." *(P. 199.)*

Johnson v. Oppenheim, 55 N. Y., 280 (291).
Bryant v. Goodnow, 5 Pickering (Mass.), 228.
Farlow v. Ellis, 15 Gray (Mass.), 231.
Weymouth v. Gorham, 22 Maine, 385.
York v. Penobscot, 2 Greenleaf (Me.), 1.

In *Johnson v. Oppenheim,* this principle is thus stated:

"When some formal act or acts are to be performed by a party as a condition precedent to some right, or to perfect a right of action or property, and the act as performed is defective or imperfect, and the adverse party, whose right it is to object

and insist upon a more perfect compliance with the condition, makes no objection to the manner of its performance, but accepting the performance as perfect, places his objection to the claim and right asserted upon another distinct and independent ground, he is held to have waived all objection to the formal or technical defects. * * * The rule rests upon the ground that the party by his silence has misled his adversary, and not having spoken when he ought, shall not be permitted to speak when he would. The principle has its most frequent application in actions upon policies of insurance, where there have been some defects in the preliminary proof of loss or of interest, which have not been objected to, but the claim has been resisted on other grounds."

CAN RECOVERY BE HAD ON A POLICY OF INSURANCE WITHOUT FIRST PAYING OR OFFERING TO PAY DELINQUENT AND UNPAID PREMIUMS?

The opinion of a majority of the court in the case of *Baxter v. Brooklyn Life Ins. Co., 119 N. Y. Rep., 450,* and cases adopting it, was followed as authority for a recovery of the insurance without first making payment or tender of delinquent premiums. The decision in that case was by a divided bench of four judges in favor and three in opposition. Andrews, J., with whom Earle and Gray, JJ., concurred, insisted that the payment or proper tender of delinquent premiums was a necessary condition precedent. From his opinion we quote as follows:

"But it is a condition precedent to the maintenance of such action that the plaintiff must, before suit brought, have paid or tendered the premium unpaid. The plaintiff, under the statute of 1877, is not required as before to show that it was paid or tendered on the day fixed in the policy, but he must aver and prove that payment was made at some time before the action was commenced, or else no right of action has accrued. This is in accordance with the well-settled rule that in mutual promises the plaintiff seeking to charge the defendant, must aver and

prove performance on his part of that which was the consideration of the defendant's promise, and this as well where the promise of the plaintiff was to be performed before the day fixed for performance by the defendant, as where the performance of respective promises were concurrent and independent."

Loud v. Land Co., 153 U. S., 564.
Phillips Co. v. Seymour, 91 U. S., 646 (650).

There might be some more plausible ground for violating this rule of law and practice in states where the distinctions between law and equity are abolished than in the federal courts wherein such distinctions are definitely preserved.

This court has said concerning the nature of such a contract:

"It is an entire contract of life insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * * Each installment (premium) is, in fact, part consideration of the entire insurance for life. It is the same thing where annual premiums are spread over the whole life. * * * The whole premiums are balanced against the whole insurance."

Ins. Co. v. Statham, 93 U. S., 24 (30).
See also Kellner v. Ins. Co., 43 Fed., 623 (627).

Notwithstanding the New York statute, therefore, and even if it be held applicable to this contract, there became due from Mr. Hill to the company April 29th, 1887, and each succeeding year, including 1890, the premium of $814.00, and such premiums remained due at the beginning of this action.

Thompson v. Ins. Co., 104 U. S., 252 (260).
Insurance Co. v. Unsell, 144 U. S., 439 (447).

In the former of these cases, the court says:

"A fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been

made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has heretofore failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstance relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all."

In the latter case, the beneficiary relied upon a waiver as excusing payment of the premium at the time the same was due and as defeating the right of the company's forfeiture; but there was evidence in this case that payment of the premium had been tendered subsequent to the due date. In discussing this question, Justice Harlan, at page 447, says:

"If the plaintiff had sued on the policies or certificates *without having paid or tendered the amount due to the company*, the non-payment of which, at the time stipulated, was relied on to prove that the policies had become forfeited, that *fact would have been fatal to a right to recover, in any view of the case.*"

DOES THE GENERAL STATUTE OF NEW YORK RELATING TO BUSINESS OF LIFE INSURANCE COMPANIES AFFECT THE MUTUAL LIFE INSURANCE COMPANY CHARTERED UNDER A SPECIAL STATUTE OF THAT STATE?

Now the question to be solved here, is whether the special act of the legislature of the state of New York of April 12th, 1842, entitled "An Act to incorporate The Mutual Life Insurance Company of New York," is affected by the general statute relating to insurance corporations transacting business in the state of New York. (See Petition, p. 2.) This special act of the legislature is the charter of the corporation; it is the fundamental law which governs it, except so far as the same

has been altered by statutes properly passed. It is true that Section 18 of this act provides that the legislature may at any time alter or repeal this act; but it never had altered or repealed it, except in 1851, when it passed an amendment to the act, which is of no importance here, and afterwards, in April, 1862 when it passed another amendment to the act which is of no importance in this case. No other act has ever been passed by the legislature of the state of New York amending the special act of the legislature to incorporate The Mutual Life Insurance Company of New York. Certainly the general statute cited in the petition does not alter the charter of this company; certainly it does not decrease its power; certainly it cannot affect any of its rights under the contract which it made with the state. It is in violation of statutory construction to hold that a special act of the legislature is altered, amended or repealed by general legislation, unless particular reference is made to the special act, or it is otherwise made clearly manifest that the special legislation was intended to be embraced within the general act. It may be subjected, indeed, to the general provisions of law under the police power which the state has a right to enact.

THE PENAL CONSEQUENCES RESULTING FROM OBEYING THE NEW YORK STATUTE WILL NOT BE ENFORCED IN ANOTHER STATE.

This company is required by the statute to send a notice of the coming due of each installment of premium to the policy-holder or his assignee, and if the court finds it has failed to do so in this case, what is the consequence? It must pay the penalty. Is the state of Washington going to enforce the penal laws of the state of New York, and collect from its disobedient corporations the sums which they have been mulcted in, for doing or not doing something which the laws of New York require to be done or to be left undone?

The authorities holding that states will not enforce the penal laws of other states within their jurisdiction are too numerous to cite. We cite only those which hold that the United States courts sitting in other states enforce only the laws of the states in which they are sitting, and will not enforce the penal laws of other states.

The Antelope, 10 Wheaton, 66.
Flash v. Conn, 109 U. S., 371.
Lyman v. B. & A. R. R. Co., 70 Fed. R., 409.
Huntington v. Attrill, 146 U. S., 657.
Texas v. Day Co., 41 Fed. R., 228.
Wisconsin v. Pelican Co., 127 U. S., 265.

We, therefore, argue that the general statute of New York respecting notice did not become a part of the charter of the insurance company and cleave to it going with it into other states and was not intended to affect either its being or its transactions outside New York.

American Bible Society v. Marshall, 15 Ohio St., 543.

MEANING OF THE STATUTE OF NEW YORK.—WAS IT THE INTENTION OF THE LEGISLATURE TO PROTECT THE AMOUNT OF THE POLICY FROM FORFEITURE, IF NOTICE OF UNPAID PREMIUM WAS NOT GIVEN, OR ONLY SUCH PORTION THEREOF AS PREMIUMS ALREADY PAID HAD PURCHASED?

If the New York statute applies to this case and the penalties of failing to mail the notice prescribed by that statute are visited upon the corporation, what is the punishment? A mutual life insurance company is a mutual association of which every policy owner is a member, the corporation being but the agent or trustee of this association of individuals. By taking a life insurance policy and paying the annual premium he enters into partnership. One of the members of the association was en-

titled to have a certain statutory notice mailed to him by some agent of the corporation stating the amount of the premium or interest due on the policy, the place where the interest or premium is to be paid, and the person to whom the same is payable, the notice to state that unless the premium or interest then due shall be paid to the company or duly appointed agent within thirty days after the mailing of the notice the policy will become forfeited and void. This notice is not deposited in the mail, but the member is otherwise fully possessed of all the information such notice can impart and so confesses. He fails to pay his premium, not for want of notice, but for want of money, and from that time forward suffers his premiums to go unpaid. Shall he, under such circumstances, make the want of formal notice, though possessed of actual notice, his excuse for taking advantage of his own failure to mulct his associates in damages to the amount of his failure? Is such the intent of the legislature?

To construe a statute properly there should be an appreciation of the exact quality of the evil against which it was aimed, its extent, and its mischief. If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute, then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all things, the statute must be construed in a spirit of justice. It must not be extended beyond the remedy which is sought to be enforced, and particularly it is not to be extended so as to do injustice, or inconvenience, or absurdity. We are not to suppose that the legislature, in attempting to remedy a wrong, itself committed a greater wrong, or that in its attempt to remedy a hardship it has committed injustice.

Now let us look at this statute in the light of these principles.

Contracts of insurance are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid, annual, or semi-annual, or quarterly installments of premium are paid to the company. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid, and that they should be so paid on the day they are due, because life insurance takes into account not only the average human life, but compound interest upon the installments which are paid. To leave out either element would destroy the scientific theory upon which life insurance is based. The contract is not for a fraction of a year, or from one installment period to another; although there is that sort of insurance, called "term insurance," and this statute expressly excludes that sort of insurance from its provisions. But the insurance for life is the insurance which we are now to deal with; and the policy before you in this case, which is the contract upon which the adjudication of this case is to be made, shows exactly what was to be done by both parties to the agreement. The contract is in two parts. One is a proposition in writing (the application) made in Seattle, in the state of Washington, immediately prior to the 29th day of April, 1886, signed by George Dana Hill and addressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as an inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy.

The policy contains the following provision:

"If this policy shall become void by non-payment of premiums, all payments previously made shall be forfeited to the company except as hereinafter provided."

Now, here is the forfeiture which the statute refers to, this

is the forfeiture which it is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to continue a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute as that, not only is the forfeiture waived, which in this case amounted to one year's premium, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance company which is unnecessary in order to accomplish the non-forfeiture of the premiums. It is not necessary to go to this length in order to sustain the statute. The statute was intended to provide that notice should be given of the recurrence of the payments, so that the policy-holder should not be taken by surprise, or affected by forgetfulness, oversight or sickness, and thus prevented from paying his premium on the very day it was due. It was an extension by the statute of an equitable interposition to prevent the forfeiture. This cannot be construed to bring about a greater forfeiture than it was made to prevent. It cannot be construed, without violating reason and justice, to mean that the policy-holder was forever discharged from his obligation to pay the premium because of the failure of this notice. There is something to forfeit. There is an accretion in the hands of the company of the surplus paid on each succeeding year the policy has been in force, which is forfeited unless the premium is paid. And to make sure the payment of which, the clause of forfeiture was inserted in the policy. *It is to prevent that forfeiture that the statute was passed; and in this case one year's premium has been paid.*

To do equity between the parties, you must deduct from that one year's premium the cost of carrying the insurance for one year as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case. (See Record, p. 6.)

This is rendered clear by the decision of the Supreme Court of the United States in the case of the New York Life Insurance Company v. Statham, 93 U. S., 24. The policy in this case had become, by its terms, void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the condition of the country, being in a state of war with the southern states.

Says the court in that case:

"Non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

Then the court goes on to show that what there is in the hands of the company to be forfeited is surplus premiums over the amount which was necessary to carry the expired risk, and which is called in insurance circles the "reserve." That reserve is equitably the property of the insured; and when he is forced to go out of the company by the unforseen exigencies of war, he is entitled to take that amount with him.

That is all that could have been forfeited under any circumstances by the contract. Now the statute comes in and says that the company shall not forfeit that, unless it gives notice. This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die the whole amount of the insurance shall be paid over after deducting the back premiums. If he lived long enough to make

those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Hill did in this case, then the company would hear of him as it has heard in this case, with a claim for the amount insured, without any attempt whatever to pay the premiums which are confessedly unpaid and in arrears. No legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium.

This statute is, as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute was exhausted upon the failure to give the notice in April, 1887, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1888. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given."

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premium on the ground of a continuous failure to give notice.

Fisher v. N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A

passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered. If, after suit was brought for the first penalty, the company did not avail itself of the notice and cease its illegal action, a suit might be brought for another, but in the quaint language of Judge Grover, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

In this case, had we been informed of the failure to give notice, we could promptly have corrected the omission, but then Mr. Hill would have had to pay the premium within thirty days, which is just what he wanted to avoid.

A FATAL DEPARTURE FROM LAW TO LAW WAS MADE IN RENDERING THE JUDGMENT SOUGHT TO BE REVIEWED, BECAUSE THERE ARE NO PLEADINGS FOR SUCH A JUDGMENT TO BE BASED UPON.

The statute of New York was not pleaded nor the failure of plaintiff in error to comply with its provisions, nor was it even referred to in the complaint. Where the relief of the statute is relied upon as an excuse for non-performance, the statute itself becomes a necessary part of the pleading, as well as the non-compliance of the insurance company with its requirements, which relieves against the breach of conditions on the part of the insured.

Rosenplanter v. Provident Sav. Life Assur. Soc., 91 Fed., 728.

It is not a question as to whether the court takes judicial notice of the statutes of New York, but rather one of departure from law to law in the pleading. Whether a party who pleads a specific contract and performance on his part of its conditions as his right to recover shall be permitted after performance has

been controverted, to confess his non-compliance and shift his right of recovery to an unpleaded statute of a foreign state and assert non-compliance with its provisions on the part of defendant, and adopt the defendant's non-compliance with the unpleaded statute as his own excuse for non-compliance with the conditions of the contract alleged in his complaint. The right of action alleged and abandoned is the act of the party; that not alleged but relied upon is the act of the legislature of New York. With performance of the conditions alleged the right of action is perfect regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. If the statute of New York, instead of performance of the conditions of the contract by defendants in error, affords the ground of recovery, then pleading of the statute is indispensable.

Union Pacific Railway v. Wyler, 158 U. S., 285.

In the case cited, a party sued the railway company for a personal injury, basing his right to recover upon the general law of master and servant. After the cause had been transferred to the Federal Court and remained in litigation for a number of years, the plaintiff amended his complaint so as to bring himself under the fellow servant act of the state of Kansas. Upon amendment being made, the defendant interposed the statute of limitations as to an original suit begun at the date of amendment. Mr. Justice White in delivering the opinion of the court, adopted the following definitions and illustrations of departure:

"Coke upon Littleton, 304 *a*, says: 'When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of Parliament. So when in his former plea he intituleth himself

generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.'

"Comyn's Digest, 'Pleader,' (F. 8,) states the same rule, and gives the following illustrations of departure:

" 'In debt on bond by sheriff against his bailiff to pay him 20d. for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for A; defendant rejoins Stat. 23 H. 6, and 3 G. it is a departure; for pleading he has had and rejoining he ought not to pay; and for pleading common law plea, and rejoining a statute. *Balantine v. Irwin, M. 4 G. 2, C. B. Fort. 368.*

" 'So, if a man avows, for that A being seized in fee granted to him a rent, and the defendant pleads, nothing in the tenements at the time of the grant, and the plaintiff rejoins that A. was *cestuy que use* in fee, which use is now executed by the statute of uses; this is a departure.' *Pl. Com. 105 b.*

"Chitty on Pleading, *1, pp. 674, 675,* states the principle as follows: 'A departure may be either in the substance of the action or defence, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament.'

"Stephen on Pleading, *pp. 412, 413,* thus elucidates the point: 'These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also (a) departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law, in his declarations, and on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder.'

"Gould on Pleadings, *pp. 423, 424,* says:

" 'When the matter, first alleged as the ground of action or defence, is pleaded as at common law, any subsequent pleading

by the same party, supporting it by a particular custom, is a departure.' *(pp. 290-291.)*

And in applying the foregoing rules, says:

"A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the states the laws of other states are treated as foreign laws, which must be pleaded and proven. Sedgwick on Statutory and Constitutional Law, *363; Hempstead v. Reed, 6 Connecticut, 480; Swank v. Hufnagle, 111 Indiana, 453; Root v. Merriweather, 8 Bush, 397.* Although this rule is not invariably adhered to, it is part of the law as administered in the state of Missouri.

Babcock v. Babcock, 46 Missouri, 243.

"The suit here was brought in a Missouri court, and was necessarily controlled by the law of that state.

"It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule estab-

lished by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. It is true that the Federal courts take judicial notice of the laws of the several states. *Priestman v. United States, 4 Dall. 28; Owings v. Hull, 9 Pet. 607; Covington Drawbridge Co. v. Shepherd, 20 How. 227; Cheever v. Wilson, 9 Wall. 108; Junction Railroad v. Bank of Ashland, 12 Wall. 226.* This rule, however, does not affect the present suit, which was commenced in the court of Missouri. Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes which is a matter of evidence. The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute." *(pp. 295-296.)*

The preserved distinction between legal and equitable remedies in the Federal courts prevents such a departure as was made in this case. It is not contended one is entitled to insurance without payment at some time and in some form, of the premiums with which the insurance is purchased; it is not claimed that failure to give the statutory notice operates as a payment. How then, on a complaint that avers performance of all conditions, that is, payment of all premiums, is the common law court to enter into the field of accounting and ascertain what premiums have been paid and what have not, compute interest on the unpaid premiums according to the law of the forum of the state of New York, and render its judgment or

decree for whatever equitable balance may be found due? Suppose such a practice adopted where a policy had been issued to a middle-aged person immediately upon the enactment of the statute of 1876, and but a single annual premium paid, and death occurred about this time and an action should be brought upon that policy in the form adopted in this case. The aggregate of unpaid premiums and their accumulated interest would constitute an equitable setoff exceeding the amount of the policy. If, without pleadings framed for the purpose, the plaintiff is entitled to recover, why not the insurance company, the balance being in its favor?

THE STATUTE OF NEW YORK NEITHER ENTERING INTO THE CHARTER OF THE COMPANY NOR THE CONTRACT OF INSURANCE, WOULD NOT PREVENT THE PARTIES, SUBSEQUENT TO THE DELIVERY OF THE POLICY IN THE STATE OF WASHINGTON, FROM AGREEING AND CONSENTING TO DISPENSE WITH NOTICE.

By the terms of the contract it did not come into being till the premium was paid and the policy delivered at Seattle; by the express terms of the contract, it is declared "Notice that each and every such payment (of premium) is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived." (Petition, p. 6.)

Freedom of contract to the foreign corporation obtained in Washington. The laws of that state gave to such corporation authority "to do and perform every act and transact every kind of business within this state, in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of the state." (Petition, p. 3.) The statute of New York did not enter into this contract in Washington. The parties were beyond the reach of the policy of the state of New York, therefore

they were at liberty in that state to make such after arrangement as was mutually agreeable respecting notice of the due date of premiums.

It is admitted in the record that George Dana Hill, the insured, and The Mutual Life Insurance Company agreed at Seattle, at the time the policy was there delivered, that payments of premium should be made at Seattle and that the properly signed receipts of the insurance company should be there delivered in exchange for such payments. It is admitted that in pursuance of this agreement, Hill was notified in writing by the company, and orally by its agent, shortly prior to the day when the second annual premium fell due, of its amount and due date, and upon the day it became due was also by the company's agent, presented with the properly signed receipt, when payment of the premium was demanded; that Hill declined to make payment, but informed the agent of the company of his inability to do so, and of his purpose of making no payment of premium upon the policy, either then or subsequently to become due, but on the contrary intended to allow the policy to become lapsed and forfeited for want of the payment of the premium then due and any premium to accrue in the future; that he was aware of the fact the agent had, after such refusals and expressions on his part, returned the receipt to the home office, advising it of Hill's determination. It was also admitted that Hill was informed the insurance company, acting upon his refusal and representations, had noted and entered the policy upon its records as forfeited, and relying upon the representations and conduct of Hill, the insurance company was induced to and did, declare the policy forfeited and abandoned, and upon the faith of such representations and conduct on the part of the insured, abstained from giving any other or further notice. (Record, pp. 22 and 23; Petition, pp. 10 and 11.)

CONCLUSION.

Certiorari is a permissible remedy in a case like the one here presented. We cite as alike in principle the case of *Wabash Western Railway v. Brow, 164 U. S., 271.* We further call attention to *Saltonstall v. Birtwell, 164 U. S., 54,* wherein it having been held that the right of an importer to recover excessive duties exacted could not be recovered unless it was shown protest had been made at the time of payment, (though made afterwards and within ten days after the ascertainment and liquidation of duties), and the judgment being affirmed by the Circuit Court of Appeals, this court granted a writ of certiorari, while in the case of *"The Kate," 164 U. S., Rep. 458,* certain questions being certified to this court, it caused the whole record to be brought up in order to determine a case involving, as we apprehend, questions of less gravity and less importance, and tending less to establish uniformity of decision than the case at bar.

Telfener v. Russ, 162 U. S. Rep., 170, was an action by Russ, the holder of a contract to purchase large tracts of land from the state of Texas, against Telfener, to whom he had sold and assigned his contract, upon an alleged breach of the contract of assignment. A writ of certiorari was issued to the United States Circuit Court of Appeals for the Fifth Circuit.

So, also, in *Dashiell v. Grosvenor, 162 U. S. Rep., 425,* a patent infringement case where the decision of the Circuit Court of Appeals is final, as in the other cases cited.

In *The Conqueror, 166 U. S., 110,* this court issued its writ of certiorari, where the questions were involved as to whether a certain foreign built vessel purchased by a citizen of the United

States and brought into the waters thereof, was taxable under the tariff laws of the United States, and what was the proper measure of damages suffered by reason of the detention during the time of seizure of such vessel. While In re Chetwood, the court, making the rule absolute in allowing a certiorari where the Circuit Court exceeded its jurisdiction in judging certain parties guilty of contempt in violating the order of the court, made use of the following language *(165 U. S., 443)*:

"By section 14 of the Judiciary Act of September 24, 17 *(1 Stat. 81, c. 20)*, carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress 'to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law'; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co. v. Jacksonville Railway, 148 U. S., 372, 380.* And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, *c. 517, 26 Stat. 826*, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice."

Regarding the differences of judicial opinion respecting a number of the questions raised, and the unsettled rule as to a number of the other questions presented, as well as the importance of a decision affecting a number of cases presented contemporaneously to this court, by petitioner, and still others pending in the Circuit Court of Appeals of the Ninth Circuit, and in the Circuit Court for the District of Washington, in which your petitioner is a party, as well as the importance of a decision affecting numerous outstanding policies of The Mutual Life Insurance Company of New York, and other life insur-

ance companies similarly circumstanced, it is respectfully urged that a writ of certiorari be issued out of this honorable court to bring the record and cause before it, in order that it may decide the entire matter in controversy, as if the case had been brought before the court by a writ of error.

EDWARD LYMAN SHORT,
JULIEN T. DAVIES,
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FILED
MAR 13 1900
JAMES H. MCKENNEY,
CLERK.

No. 453.

Filed Mar. 13, 1900.

Supreme Court of the United States,

OCTOBER TERM, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by their Guardian EBEN SMITH and ELIZA MAUDE HILL, in her own behalf,

Defendants in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. In Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
Of Counsel.



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In the Supreme Court of the United States.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, *vs.* GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by their Guardian EBEN SMITH and ELIZA MAUDE HILL, in her own behalf, Defendants in Error.	No. 453.

On Writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error.

PRELIMINARY STATEMENT.

This case involves only the Act of 1877, as the insured died in 1890. There is no difference between this case and the Phinney case, except that the questions of estoppel, abandonment, waiver and rescission arise in this case upon the admissions made by the demurrer of the facts stated in the answer.

I.

Statement of Proceedings in Court Below.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on the 19th day of October, 1895, to recover the sum of twenty thousand dollars ($20,000) with interest from January 3, 1891, claimed to be due on a policy of life insurance issued by The Mutual Life Insurance Company of New York (Rec., 2, 9).

The answer was demurred to by the plaintiff and the Court sustained the demurrer to the answer and ordered judgment for the plaintiff Hill in the sum of $24,086.60 (Rec., 22).

No opinion was rendered by Hanford, J., in sustaining the demurrer and ordering judgment.

The defendant excepted to the judgment (Rec., 27).

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District.

For opinion of Circuit Court of Appeals by Hawley, District Judge, concurred in by Gilbert & Ross, Judges, see record, page 51. Also reported in 97 Federal Reporter, page 263.

In November, 1899, a petition for a writ of certiorari was filed by the defendant company in this Court with a certified copy of the record and brief. This petition and brief was submitted to this Court with brief for Hill opposing application for certiorari (see papers on file).

Writ of certiorari was thereafter granted by this Court Feb. 5, 1900, and filed.

This cause now comes before this Court on a writ of certiorari for hearing on the merits.

II.

Abstract of Pleadings.

The complaint in this action alleges that on the 29th day of April, 1886, the defendant company executed and delivered in the City of New York the policy in question, and that the application for the said policy contained the following agreement:

> "And it is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and that if said policy be issued the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York" (Record, page 8).

That the policy was in favor of Hill's wife, if living, and if not their children. That the wife predeceased Hill. That the plaintiffs are their children.

That on the 4th day of December, 1890, George Dana Hill, the insured, died. That the said Hill during his lifetime duly performed all the conditions of the contract.

The Answer.

The plaintiff in answering admits the issuance of the policy, but denies the contract was made or delivered anywhere except in the State of Washington; and further denies the allegation that Hill, during his lifetime, duly performed all the conditions of the contract, and alleges affirmatively,

1st. That the application was made in the State of Washington, the policy delivered in the State of Washington, and the first annual premium was paid in the State of Washington.

2nd. That the premiums due on the 29th days of April, 1887, 1888, 1889 and 1890, had not been paid. The policy by its terms had been forfeited.

3rd. That subsequent to the 29th day of April, 1887, it was mutally agreed between the defendant and said Hill that the contract of insurance should be waived, abandoned and rescinded. By mutual consent the contract was waived, abandoned and rescinded.

4th. That the policy contained the following clause: "Each premium is due and payable at the home office of the company, in the City of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary.

And the answer further alleges: "That upon the execution and delivery of the policy it was mutually agreed between the defendant and Hill that all annual premiums should be paid by the said Hill at the City of Seattle and the defendant's receipt therefor should be at the time of such payment delivered to said Hill at the City of Seattle."

5th. The answer further alleges that the plaintiffs should be and are estopped from and should not be permitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise given to said Hill, a notice stating the amount of the premium due on said policy on April 29th, 1887, or at any other time (Record, page 21).

The answer further alleges that shortly prior to and after and on said April 29th, 1887, the defendant notified Hill in writing, and personally, that the premium was due

and payable, and demanded payment, and at the same time tendered the receipt. That Hill refused to make payment and then and there intending and for the purpose of inducing defendant to rely upon the same, informed defendant that he, said Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but on the contrary, that he, the said Hill, intended to allow the policy to lapse and become forfeited, and the defendant then and there and ever since relying upon the said representations and conduct on the part of the said Hill was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and in good faith relying on said conduct of Hill in good faith did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said Hill, or to any person interested in the said policy, concerning the payment of any premium thereon. (Record, pages 22 and 23.)

The Demurrer to the Answer.

The plaintiff demurred to the answer on the ground that none of the defenses alleged by the answer stated facts sufficient to constitute a defense to the amended complaint. (Record, page 25.)

III.

Chronological Statement of Facts Admitted by the Pleadings.

1877. Act of 1877 passed.

1886, April 29th. George Dana Hill, a resident of the

State of Washington, executed an application in Seattle, Washington, to the defendant company for a policy of insurance on his life for the sum of $20,000 payable.

This application was forwarded by the agent to the Home Office and pursuant to such application the policy applied for by Hill was issued, bearing date the 29th day of April, 1886, and forwarded from the Home Office in New York to the agent in Seattle who delivered it to Hill upon payment of the first annual premium when the policy was to take effect.

1887. In the month of April and prior to April 29th the defendant notified Hill in writing, and personally, that the premium was due and payable, and demanded payment, and at the same time tendered the receipt. That Hill refused to make payment and then and there intending and for the purpose of inducing defendant to rely upon the same, informed defendant that he, said Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but on the contrary, that he, the said Hill, intended to allow the policy to lapse and become forfeited, and the defendant then and there and ever since relying upon the said representations and conduct on the part of the said Hill was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and in good faith relying on said conduct of Hill in good faith did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said Hill, or to any person interested in the said policy, concerning the payment of any premium thereon.

1888, April 29th. Premium not paid.

1889, April 29th. Premium not paid.

1890, April 29th. Premium not paid.

1890, Dec. 4th. Hill died.

1895, Oct. 19th. Suit commenced.

IV.

Statement of the case required by Rule 21.

The following statement presents succintly the questions involved and the manner in which they are raised.

The first question is, whether the Statute of New York of 1877 applied or not to the business of collecting premiums from non-residents which are not demanded to be paid within the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors. (See Point I.)

The second question is, whether or not under the circumstances the policy was or was not a Washington contract governed and construed by the laws of Washington alone and not by the statutes of New York in question. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors. (See Point II.)

The third question is, whether if the premium notice statute of New York of 1877 applies, its equitable and true construction aids the plaintiff in keeping the policy alive. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point III.)

The fourth question is, whether if any statutory notice was required the sending of notice was not waived by Hill, and whether actual knowledge possessed and acted upon obviated the necessity for statutory notice. The question was raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point IV.)

The fifth question is, whether or not the policy in question was not terminated by waiver, estoppel, abandonment and recission, and the question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point V.)

The sixth question is, whether or not it is essential to the maintenance of this action that the Hill beneficiaries should have paid or tendered the premiums before suit. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point VI.)

V.

Statement of Questions in Issue as presented in the petition for writ of certiorari.

FIRST.

Whether the contract of life insurance on which the action was brought is one entered into under and governed by the laws of the State of Washington or the laws of the State of New York, when the policy was delivered and the first premium paid in the State of Washington, and whether such statute of the State of New York of 1877, requiring notice to be given as therein prescribed, applies to the State of Washington at all.

SECOND.

Whether actual knowledge, possessed and acted upon by the insured at the time the premium fell due, obviated the necessity of the statutory notice prescribed by said statute of the State of New York.

THIRD.

Whether if such statute does apply to the case, the parties could and did waive the notice therein prescribed by a subsequent agreement entered into in Washington.

FOURTH.

Whether it was competent for the Legislature of the State of New York, under the said general statute of 1877, to alter and amend the charter of your petitioner, and if so, whether your petitioner, being a corporation created and chartered under a special act of the Legislature of the State of New York, was intended to be included and affected by said general act.

FIFTH.

Whether it was or is the meaning and intent of the Legislature of the State of New York, that the act of 1877, should apply to a business transaction taking place in the State of Washington, as disclosed by the record in this case, and whether said statute follows said corporation beyond the limits of the State of New York as a part of its charter, or whether the same is only operative in the State of New York upon corporate business there transacted.

SIXTH.

Whether the public policy of unrestricted liberty of contract conferred by its Legislature upon foreign corporations transacting business in the State of Washington, should be a controlling reason for determining the

contract a Washington contract, and one not affected by the statute of New York.

SEVENTH.

If it should be held that the general statute of New York of 1877, respecting premium notices applies to this case, whether the failure to give the notice prescribed by such statute can operate to render your petitioner liable for a greater measure of insurance than the amount of the premium paid will purchase.

EIGHTH.

In the event it should be held the statute of New York of 1877, as amended applies to this case, whether the penal consequences of failing to give the notice prescribed of premium falling due, will relieve the insured from paying further premiums and keep the policy alive as if such premiums had been paid.

NINTH.

Whether the failure to give notice of a particular premium maturing will have the effect of keeping the policy alive, notwithstanding subsequent premiums have not been paid.

TENTH.

Whether, although your petitioner failed to give the

notice under the statute of New York of 1877, and the premiums due on each of the following four years preceding the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property without consideration, to require your petitioner, in case of the death of the insured, to pay the amount of the policy.

ELEVENTH.

In the event the statute of New York of 1877, should be held to apply, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the premiums past due and unpaid.

TWELFTH.

Whether, in event it is held that the Statute of New York applies, it is a law relieving the insured from the consequences of a breach of his contract ; or whether it enters into the being and charter of the Mutual Life Insurance Company, and becomes a limitation upon its powers of contracting outside the State of New York.

THIRTEENTH.

Whether it was competent for the Mutual Life Insurance Company and the insured to enter into a mutual agreement in the State of Washington subsequent to the delivery of the policy, by which they mutually agreed to rescind and terminate the policy and each relieve the other from all its obligations and benefits.

FOURTEENTH.

Whether by the payment of the first annual premium and failing to pay all subsequent premiums, action can be maintained until payment or tender is made of the defaulted premiums.

FIFTEENTH.

Whether, in this action, pleading only the policy of insurance and of performance by the insured of the terms of the contract, a recovery can be had when plaintiff admits non-payment of all premiums subsequent to the first up to the death of the insured.

SIXTEENTH.

Whether, in this action, based upon the policy of insurance and the performance of its conditions, the plaintiff can admit the non-payment of the premiums subsequent to the first and recover against the defendant because the defendant fails to show the giving of notice pursuant to the statute of New York.

SEVENTEENTH.

Whether it is not a fatal departure from law to law for a plaintiff alleging as his cause of action a policy of insurance and the compliance with its terms and admitting the defense of non-payment of premiums to recover judgment because the defendant has failed to show compliance with the unpleaded statute of New York in regard to mailing notice of the due date of premium.

EIGHTEENTH.

Whether under the charter of the defendant company and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the company.

VI.

Specification of Errors.

The following are the errors assigned by the plaintiff in error, and upon which it relies for the reversal of this cause.

I.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the first and second and third affirmative answers and defenses of defendant and plaintiff in error (Assignment of Errors I, II and III, Record, p. 29).

II.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the answer of the defendant and plaintiff in error (Assignment of errors, IV, Record p. 29).

III.

The said Court erred in granting judgment in favor of plaintiff and defendant in error against defendant com-

pany and plaintiff in error for the amount of said judgment, or any (V) sum and (IV), because it was manifest upon the issues formed in said cause that said plaintiff and defendant in error was not entitled to judgment (Assignment of errors V, VI, Record, p. 29).

IV.

The said Court erred in not submitting said cause to trial upon the issues formed by the pleadings (Assignment of errors VII, Record p. 30).

See also the brief filed on the application for the certiorari.

POINT I.

The premium notice statute of New York of 1877 (Hill died in 1890), never had any application to the Hill policy because that statute did not apply to the business of collecting premiums demanded to be paid outside the State of New York. The contract was not subject to this particular statute of New York because by its true construction it had no application.

For the argument on this point see Phinney Brief, Point II, at page 59.

As the policy in this case was issued in 1886, and as Hill died in 1890, there is no question whatever in the case of the operation of any other statute during the life of the policy except the Statute of 1877.

In this case the answer *alleges* and the demurrer to the answer *admits*

That upon the execution and delivery of the policy it was mutually agreed between the company and Hill that all annual premiums should be paid by the said Hill at the city of Seattle, and that the company's receipt therefor should be at the time of such payment delivered to said Hill at the city of Seattle.

The Hill case, therefore, is one where the business of collecting the premiums was undeniably in the State of Washington.

POINT II.

Under the circumstances surrounding the application for the issuance and the delivery of the Hill policy in the State of Washington it was a Washington contract and under the true doctrine of the conflict of laws the New York Statute of 1877 was not the law of this contract.

For argument on this point see Phinney Brief, Point III, at page 79; also Cohen Brief, Point II. See also the opinion of the California Court in the case of Rosson *v.* Equitable, appended to the Cohen Brief.

POINT III.

But if this Court should hold contrary to our contention in Point I as above, that the statute of 1877 apply to this contract and to the business of collecting premiums outside the State of New York, then it is submitted that the equitable and true construction of the statute so found applicable is that the statute operated on the first default alone without notice and did not preserve the contract forever on successive defaults, and further that the forfeiture of the premiums already paid was all that was prohibited.

For argument on this point see Point IV in Phinney Brief, page 94.

POINT IV.

If the Court holds that the true construction of the statute of 1877 required a notice to be sent Hill unless waived, then it is claimed by the plaintiff in error the sending of any statutory notice was waived by Hill by the express terms of the policy, and that actual knowledge, possessed and acted upon by Hill, obviated the necessity for statutory notice.

For argument on this point see Point V, Phinney Brief, p. 116, and Point VI., page 143.

It is admitted by the demurrer to the answer in this case that shortly prior to and after and on said twenty-ninth day of April, 1887, this defendant in writing, and also personally, notified and informed the said George Dana Hill, at said city of Seattle, that the premium of eight hundred and fourteen dollars, necessary to be paid on said policy for the continuance of said policy of insurance, was due and payable, and said defendant duly demanded payment of said premium in said sum, and at the same time and place tendered the receipt of the defendant therefor, duly signed by its president and secretary; and the said Hill being fully so informed and advised in the premises refused to make payment of said premium, or any part thereof, and then and there intending and for the purpose of inducing defendant to rely upon the same, informed defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but on the contrary he, the said George Dana Hill, intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or of any future premium accruing on said policy; and the said defendant, then and there and ever since relying upon the said representations and conduct on the part of the said George Dana Hill was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and in good faith relying upon said conduct and representations on the part of said George Dana Hill, this defendant was induced to and did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon.

POINT V.

The contract was abandoned by Hill and this he had a right to do.

For argument on this point see Phinney Brief, Point VI., p. 143.

The Circuit Court of Appeals in affirming the judgment herein, said in reference to the contentions in above Point IV and this Point III as follows:

"The plea of estoppel, as set forth in the third affirm-
"ative defense, is but another name for waiver. There is
"no question concerning the plea of estoppel that can be
"distinguished from the question as to the plea of
"waiver. As the parties could not waive the require-
"ments of the statute, as to the manner in which the
"policy could be forfeited, how could the beneficiaries
"who had vested rights therein be divested of such rights,
"except in the manner provided by law? They cer-
"tainly could not be bound by any declarations which
"their father may have made in his life time to any agent
"or officer of the insurance company, as to his inability
"to pay the premium then due upon the policy; or that
"he did not intend to pay that, or any future premium;
"or that the insurance company might consider the policy
"forfeited without giving the notice specified in the
"statute. To so hold would entirely abrogate the pro-
"visions of the statute and of the policy" (Rec., p. 65).

The law applicable to the *admitted* facts is fully set forth in the waiver, Phinney brief and reply brief.

The Circuit Court misapprehended the relation of Hill to this policy.

Hill applied for the policy, and himself paid the first premium.

The act of 1877, if applicable, requires the notice to be addressed and mailed *not to the beneficiaries*, but to "*the persons whose life is assured.*" That is, the statutory

provisions as to notice related solely to *Hill* (for there was no assignment in this case). If Hill was the only person entitled to notice, then Hill was the person who could waive such notice. Hill was under no obligation as between himself and the beneficiaries to pay the premium. The beneficiaries were entitled to no notice. They could, of course, have paid the premium if they had wished to do so. Hill's wife, the first beneficiary, was alive on April 29, 1887, when the second premium became due and was not paid.

The question is not whether Hill could surrender a live policy without the wife's or children's consent. This policy was lapsed and forfeited by its terms, and by such terms the wife and children had no interest. The lack of notice to Hill himself is claimed to keep it alive, and the only question is whether the person entitled to notice may not so conduct himself as to render lack of notice to *him* inoperative. Hill was under no obligation to his wife and children to pay the premium, and likewise he could be under no obligation to them to do or abstain from doing anything which would render the lack of notice operative or inoperative.

POINT VI.

The alleged cause of action was not pleaded, and there was departure. See Phinney brief. Point VII.

POINT VII.

The judgment should be reversed.

JULIEN T. DAVIES,
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JOHN B. ALLEN,
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No. 453.

Brf. of Warburton for Plaintiff

Supreme Court U. S.
FILED
NOV 20 1899
JAMES H. McKENNEY,
Clerk.

Filed Nov. 20, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 453

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

GEORGE E. HILL, HELEN K. HILL, AND E. C. HILL ET AL., DEFENDANTS IN ERROR.

S. WARBURTON,
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EBEN SMITH, *Of Counsel.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-20-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

GEORGE E. HILL, HELEN K. HILL, AND E. C. HILL ET AL., DEFENDANTS IN ERROR.

The petitioner has asked leave to file like petitions for writs of certiorari in two other cases, Mutual Life Insurance Company *vs.* Sears and Mutual Life Insurance Company *vs.* Cohen, which were argued in the circuit court of appeals at the same time and in connection with the above case. They were decided at the same time, the court writing the principal opinion in the above case, and referred to it as the decision governing the law of the other two above-mentioned cases. (See Record, Insurance Co. *vs.* Sears, p. 45; Insurance Co. *vs.* Cohen, Record, p. 51.) So we shall, in a large measure, brief these three cases together under the above title and file in each of the two other cases short briefs, calling the court's attention to the points of difference in each.

We do not think that the petitioner has brought itself

within any of the requirements of the rule laid down by this court as to when it will grant a writ of certiorari. In the case of Lau Ow Bew *vs.* The United States, 144 U. S., 47, on page 58, this court says writs of certiorari—

"will only be issued when questions of gravity and importance are involved, or in the interest of uniformity of decision. The object of the act is thereby obtained."

Again, in the case of Amer. Cons. Co. *vs.* R. R. Co., 148 U. S., 372, on page 383, this court, speaking of its authority to grant writs of certiorari, says it—

"has been held to be a branch of its jurisdiction which should be used sparingly and with great caution, and only in cases of peculiar gravity and general importance or in order to secure a uniformity of decision."

The petitioner has not pretended to show that it raised any question in the court below of any peculiar or particular gravity. If so, what one? We venture the assertion that no question can be found of any more gravity, as the word is used by this court, than there may be found in almost any case that goes to the circuit court of appeals.

It cannot be urged seriously that any constitutional question is raised; none was assigned as error in the circuit court of appeals, and none can be urged here.

Nor can it be urged that this court should pass upon any question raised in order to secure a uniformity of decision.

On every question assigned as error there is a uniformity of decision. Every court—and they are numerous—that has passed upon the errors assigned has held against its contention. In fact, if this court should grant this writ and upon the hearing sustain any one of petitioner's assigned errors, then for the first time would there be a conflict of decision. This will clearly appear *infra*.

This action was begun in the circuit court to recover on a policy of insurance issued by the Mutual Life Insurance

Company of New York upon the life of George D. Hill. The company denied liability on the policy, on the ground that the policy became forfeited prior to Mr. Hill's death, on account of non-payment of an annual premium, and that defendant in error was estopped from denying that a forfeiture had taken place. The petitioner claimed that the policy was made in the State of Washington and was a contract to be construed only by the laws of that State.

The defendant in error contended that the policy (1) was a New York contract and governed by its laws; (2) that the law of 1876, amended in 1877, requiring a specified statutory notice to be served as a condition precedent to the right of the company to declare a policy forfeited, was in the nature of an amendment of the charter of insurance companies or a limitation on their powers, so as to make it compulsory upon such companies to serve the statutory notice, no matter where the contract was made.

The lower court held that it was a New York contract; that the statute was a part of defendants in error's contract; that the service of the notice required by the statute could not be waived, and as the petitioner made no claim or pretense that it complied with or attempted to comply with the requirements of the statute, held the company's defense not good, gave defendants in error judgment, and its action was by the court of appeals affirmed.

Only three questions of any importance were involved:

1. Was New York the place of contract?

2. If not the place of contract, was the statute in question a limitation on the power of petitioner, so that it could only forfeit the contract therewith?

3. Whether the statute of New York relative to forfeiture could be waived directly or indirectly?

We will support our contention that it was a New York contract, that it was a limitation on the power of the cor-

poration, that it could not be waived, by every court that has passed upon it or a like question. But of particular and great importance is the fact that the highest of New York has so held, which binds every other court.

All other questions raised, and they are not of importance, such as necessity of tender of unpaid premiums, and the form of pleadings, etc., have also been decided, both by the highest court of New York and the State of Washington, and that we followed those decisions in every particular. In fact, there is no contention that we did not. In addition, all these questions have been decided in our favor by the supreme courts of California, Iowa, Texas, and Michigan; also by 3rd C. C. A. and 9th C. C. A. We will discuss these propositions in the order named.

I.

THE POLICY OF INSURANCE IN CONTROVERSY IS A NEW YORK CONTRACT, AND CONTROLLED BY THE STATUTE OF NEW YORK WITH REFERENCE TO FORFEITURES OF LIFE-INSURANCE POLICIES.

The statute above referred to is found in full in the court's opinion, Record, p. 57.

The application for the policy of insurance was made to the company at its home office in New York. The policy was issued in New York upon receipt of the premium, of which it acknowledges the receipt. The premiums were all payable in New York. By its terms the proofs of death were to be delivered at the home office of the company in the city of New York. The policy when it matured was payable in the city of New York. The policy was to be forfeited, if at all, by the non-payment of a premium at the home office in New York. In other words, New York was the place of performance in every particular. This shows clearly that the parties in-

tended that the laws of New York should govern as to the liabilities of the parties and to be the place of contract. Especially is this true of defendant in error. It prepared the policy; all these provisions were in the printed form of the policy. Again, a clause in the printed form of the policy expressly waived the requirements of the service of the statutory notice. What statute did it refer to, if not this New York statute. It could not refer to one in Washington, because there was none to waive.

The provision relative to waiving service of the statutory notice could only refer to the statute of New York; hence the company clearly considered it a New York contract. It was also stipulated in the application that "*the contract of insurance when made shall be and be construed at all times and places to have been made in the city of New York*" (Record, p. 8).

The policy also provided that after the payment of stipulated premiums and upon the surrender of the policy it would issue a new one "for the amount required by the act of May 21, 1879, chapter 347, Laws of the State of New York." (See Record, p. 6, bottom of page.) Hence its liability to its policy-holders as to the reserve and the portion (two-thirds by the New York law) it would give its policy-holders in case of default was to be measured by the New York law—a very good reason why the company wanted to make no mistake about the contract being a New York contract.

If we stop to consider that this policy was prepared by the company, and we may presume by those skilled in the law relative to such contracts, it is impossible to come to any other conclusion than that it was intended by the insurance company to bring the policy within the protection of the New York laws and have its liability measured by such laws—at least, it used language most appropriate to express such intent—and exclude every other legal con-

struction. It cannot complain if the court so interpret the contract, which it prepared presumably in its own interest.

We do not believe a case can be found anywhere which, under the above facts, would not support our contention that the above facts make the contract in controversy a New York contract. A recent decision of this court in the case of London Assurance *vs.* Companhia de Moagens de Barreiro is to that effect. In that case there was not nearly so much in the contract to show the intent of the parties as to the place of the contract as there is in the one we are now discussing:

"Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia by its agents, and that contract, by its terms, was to be performed in England. The parties to it understood and agreed that, in case of loss or damage to the interest of the insured under the certificate, the same was to be reported to the corporation in London, and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the Loyds, but subject to the conditions of the policy and the contract of insurance.

"Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretations."

Mr. Justice Peckham, after reviewing other cases sustaining the doctrine announced, closes the opinion relative to this feature of the case in the following language:

"This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. (See Liverpool & G. W. Steam Co. *vs.* Phœnix Ins. Co., 129 U. S., 397, 446, 453; 9 Sup. Ct., 469)."

London Assurance *vs.* Companhia de Moagens de Barreiro, 167 U. S., 149.

The following are excerpts from decisions of various courts, fully sustaining our claim:

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

Wash. Central Bank *vs.* Hume, 128 U. S., 195.

"The only substantial difference between this case and No. 1507, just decided, is that the clause set out and construed in that case was not in the policy upon which the action was brought. There was, however, in the application upon which it was issued a provision that, 'this application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York,' and, in our opinion, this was sufficient to locate the contract in that State, and require that rights thereunder should be determined by its laws.

"Hence, for the reasons stated in the opinion in the foregoing case, the judgment rendered in this must be affirmed."

Griesemere *vs.* Ins. Co., 10 Wash., 211.

"The policy was signed by the president and the secretary of the company, in the city of New York. The premium was made payable there and the amount of the policy was to be paid, in the event of the death of the assured, at the city of New York. It was also expressly agreed that the policy should be construed to have been made in the State of New York. It was therefore a New York contract, and is to be governed by the laws of that State."

Goodwin *vs.* Ins. Co. (Iowa), 66 N. W., 157, on p. 160.

The circuit court of appeals for the sixth circuit in a very recent case, in an opinion by Judge Taft, says:

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that 'the place of contract shall be the city of Philadelphia,

State of Pennsylvania.' In Weyman *vs.* Southard, 10 Wheat., 1–48, Chief Justice Marshall stated it to be a principle of universal law that 'in every forum a contract is governed by the law with a view to which it is made.' (See Pritchard *vs.* Norton, 106 U. S., 124, 136; 1 Sup. Ct., 102, and cases there cited.) In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. *vs.* Savings Bank, 72 Fed., 413, on p. 418.

In a recent case this question was before the supreme court of Texas. The provisions in the applications for policies in the case were that "this application is made to the Mutual Life Insurance Company of New York subject to the charter of the company and laws of New York." The court says:

"We think the provisions of the New York statute, under the facts as shown in this case, entered into and became a part of the contract between the parties."

Mullen *vs.* Mutual Life Ins. Co., 34 S. W., 605.

The following authorities fully support the above authorities:

Phinney *vs.* Insurance Co., 67 Federal Reporter, 493.

Coglan *vs.* Railroad Co., 142 U. S., 101, at page 109.

Hall *vs.* Cordell, 142 U. S., 116, at page 120.

Washington Bank *vs.* Hume, 128 U. S., 206.

Pritchard *vs.* Norton, 106 U. S., 124, at pages 136–141.

Scudder *vs.* Bank, 91 U. S., 406.

Scotland Co. *vs.* Hill, 132 U. S., 107.

Steamship Co. *vs.* Phœnix Insurance Co., 129 U. S., 397.

Penn. Insurance Co. *vs.* Bank, 19 C. C. A., 285.

Nixon *vs.* Insurance Co., 81 Federal Reporter, C. C. A., 796.

Miller *vs.* Tiffany, 1 Wall., 298, on page 310.

Hyde *vs.* Goodnow, 3 N. Y., 266–269.

Griffith *vs.* Insurance Co., 106 California, 627.

Goodwin *vs.* Insurance Co., 66 Northwestern (Iowa), 157, at page 160.

Massachusetts Insurance Co. *vs.* Hale, 23 Southwestern (Ga.), 849.

Mullen *vs.* Insurance Co., 34 Southwestern (Texas), 605.

Insurance Co. *vs.* Pollard, 26 Southeastern (Va.), 422.

THE CLEMENT CASE, CHIEFLY RELIED UPON BY PLAINTIFF IN ERROR, IS NOT IN CONFLICT WITH THE PROPOSITION THAT A CONTRACT IS TO BE CONSTRUED BY THE LAWS WITH A VIEW TO WHICH IT IS MADE.

The cases cited by plaintiff in error which it claims hold against this contention of defendant in error are not in point. The one chiefly relied upon is the case of Clement *vs.* The Equitable Life Insurance Company, 140 U. S., 226.

In the first place, there is no provision in the contract (either in the policy or application, which together make one contract) stipulating that the contract should be subject to the laws of New York.

In the second place, the Equitable Insurance Company, as a matter of comity, not of right, was permitted by the State of Missouri to come into that State and make contracts with the citizens of Missouri. Having been thus permitted to come into the State to make contracts with its citizens, it was perfectly competent for the State of Missouri to impose such terms upon it and like companies as the State saw fit, or exclude the foreign insurance companies altogether from their territory.

Bank *vs.* Earl, 13 Peters, 519.

Runyan *vs.* Coster, 14 Peters, 122, at page 129.

Hooper *vs.* State of California, 15 Supreme Court Reporter, 207, at page 220.

The legislature prior to the making of the contract had passed an act regulating the forfeiture of life-insurance policies after the paying of two annual premiums, to the effect that the insured should have the benefit of his reserve by the way of extended insurance. This statute established the public policy of the State of Missouri relative to such contracts. By another provision of the law it was made the duty of any foreign insurance company, if it accepted the privilege of doing business in that State, to make all its contracts in compliance therewith. The section last mentioned is in the following words:

"SECTION 5983. No policy of insurance on life, hereafter issued by any life insurance company authorized to do business in this State on or after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, become forfeited or void by reason of the non-payment of premium thereon, but it shall be subject to the following rules and commutations, to wit:"

The policy in the Clement case was issued after the first day of August, 1879, as provided in the above section. It must be presumed the company was authorized to do business within the meaning of that section. If so, then it accepted the terms provided in the statute and was bound to make no contract of forfeiture in disregard of the statute. But this it did attempt to do, even though the contract was actually consummated in Missouri. This court held two things: first, that the contract was a Missouri contract, as it was there consummated; second, and more important than the above, it held that this statute could not be waived by the parties. If the statute could not be expressly waived by the parties because of the provision of the statute above set forth (which is copied in the opinion of the court), then it must follow that it could not be done indirectly by making the place of contract outside of Missouri in order to avoid this statute. It would be a strange rule of law that would hold the parties could not waive a statute of Missouri and yet

hold that it was competent for the parties to make a contract in Missouri and to avoid the statute by making the place of contract elsewhere. It needs no authority to support this distinction. It suggests itself forcibly and distinctly. No other result could be reached logically. But we are not without authority on the proposition. It has been clearly recognized in two decisions of this court.

In the case of Hume *vs.* The Ins. Co., 128 U. S., 195, already cited, the company was a Connecticut company. The contract was actually consummated in the District of Columbia; but the contract further provided that Hartford, Connecticut, should be the place of contract. The Supreme Court of the United States held that the contract was subject to the laws of Connecticut, and those laws should control as between the parties to the contract as well as creditors of the insured, and in so deciding Chief Justice Fuller says:

"And if it is so as between Hume and the Connecticut companies, then he could not at any time dispose of these policies without the consent of the beneficiary. Nor is there anything to the contrary in the statutes or general public policy of the District of Columbia."

Washington Bank *vs.* Hume, 128 U. S., 195, on p. 207.

In other words, if there had been a statute or public policy of the District of Columbia which the company was attempting to evade by making the place of contract Hartford, Connecticut, such provisions of the contract would have been null and void.

In the case of London Assurance Co. *vs.* Companhia de Moagens, etc., *supra*, the same distinction is recognized. In this case the contract was actually made in Philadelphia. The policy covered the vessel *en route* to Portugal. The contract was to be performed in England. This court held for that reason that it was an English contract, and that it would determine the rights of the parties according to the

English law, inasmuch as construing it by the English law would not in any manner conflict with the policy of the State of Pennsylvania, where the contract was actually made. The portion of the opinion below quoted suggests that if the parties were seeking to avoid the public policy of the State of Pennsylvania by making the place of contract England, it would not have enforced it according to the laws of England. The portion of the opinion referred to is as follows:

"This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to our own."

London Assurance Co. *vs.* Companhia de Moagens de Barreiro, 167 U. S., 149.

This same doctrine with reference to this same Missouri statute is very forcibly set forth in a decision rendered by Judge Treat, in which Judge McCrary concurred.

Fletcher *vs.* Insurance Co., 13 Federal Reporter, 562, at page 568.

In a subsequent case the above opinion was cited with approval by Mr. Justice Brewer, sitting as district judge.

Ball *vs.* Insurance Company, 32 Federal, 273.

In a subsequent case Judge Caldwell, sitting in the same circuit, concurred with Judges Treat, McCrary, and Brewer in the opinions above referred to.

Berry *vs.* Insurance Company, 46 Federal, 439.

The ninth circuit court of appeals in the case of Ins. Co. *vs.* Nixon thus distinguished the Clement case from one similar to this, where the insurance company were maintaining the same position that petitioner is here, using this language:

"Not only so, but, as has been seen, all of the conditions of the policy were to be performed in that State (New York). Proof of loss, if any, was to be made there, and the payment agreed to be made by the defendant corporation in the event of the death of the assured was to be made in the State of New York. It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that State, subject, perhaps, to any additional limitations or conditions imposed by the statutes of the State (then Territory) into which the defendant corporation went to solicit the business in question; for it may be true that every foreign corporation that enters a State other than that of its creation, and there transacts business, does so in subordination to the statutes of the State permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contract, be removed from the operation of the statutes of the State permitting the business to be transacted. But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question."

Ins. Co. *vs.* Nixon, 81 Fed., 798.

THE STATUTE OF NEW YORK IS A LIMITATION ON THE POWER OF THE CORPORATION AS TO THE FORFEITURE OF INSURANCE CONTRACTS AND IN EFFECT AN AMENDMENT OF ITS CHARTER, AND CONTROLS THE CORPORATION AS TO THE MANNER OF FORFEITING POLICIES OF INSURANCE, NO MATTER WHETHER THE CONTRACT IS MADE INSIDE OR OUTSIDE OF THE STATE OF NEW YORK.

There can be no question but that the State of New York could so limit the power of insurance companies by it incorporated, if it saw fit to do so. It is by its authority alone that the corporation exists. It has such powers, and only those, as the State sees fit to grant to it. The State can prescribe the condition upon which such corporations may forfeit such contracts. Did the legislature of New York, by this act, so limit this and like corporations chartered by it?

If it was a new question or if the highest court of New York had not so construed the law, it might be a debatable one; but that court has twice decided that such is the meaning and scope of the act.

One Carter was a resident and citizen of the State of Georgia. In 1870 the Brooklyn Insurance Company of New York issued a policy of insurance on his life. Where this contract of insurance was consummated is not shown in the opinion or statement of the case, and it is immaterial. The contract was made six years before the enactment of the statute, the law requiring notices. In 1877, 1878, 1879, and 1880 Mr. Carter paid his renewal premiums in Georgia; so, according to the petitioner's contention, the contract of renewal was made in Georgia. It would not be a renewal within the meaning of the following opinion until it was paid in Georgia. The appellate court of New York was compelled to pass upon the question whether or not the payment of a renewal premium was a renewal of the contract within the meaning of the statute. It held that it was. The opinion on this point is as follows:

"Upon this state of facts several questions arose upon the trial, among which the material ones are:

"First. Whether the law of 1876 requiring notices to be sent to the policy-holders applies to this policy?"

"It is contended by the appellant that the act applies only to policies 'issued or renewed' after its passage, and that a policy cannot be said to have been renewed unless it has become forfeited or lapsed, and has been afterward restored or renewed by the insurance company." * * *

"We are also of the opinion that the payment, and receipt by the company, of each annual premium constitute a renewal of the policy within the meaning of the term 'renewal' as used in the act."

(The renewal was made by the assured in Georgia.)

"While it was provided by the policy that it should continue for the term of the natural life of the assured, it was expressly provided that this was upon the condition that he

should pay the annual premiums as they became due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void, and of no effect, but when paid it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination." * * *

"We are, therefore, of the opinion that the plaintiff's policy was renewed within the meaning of the act. We are also of the opinion that no such notice was given to him as the statute required. The law reads that the notice should be sent to the assured at his known place of address, and there is no claim but that the defendant knew his place of address at all times subsequent to the year 1880."

Carter *vs.* Life Ins. Co., 110 N. Y., 15, on page 20.

In a subsequent case the appellate court of New York was called upon to pass upon the question whether or not it was necessary for the Brooklyn Life Insurance Company of New York to send a notice to the policy-holder residing in the State of Pennsylvania.

One Matteson, on the 24th day of May, 1884, took out a policy in the above company. He paid but one quarterly premium and the company failed to serve upon him a notice for the second quarterly premium, and he thereafter died without having paid this premium. It appears by the record which we have had certified by the clerk of the court of appeals of New York, and which we will file with these briefs, that Mr. Matteson for at least ten years prior to the issuance of the policy had resided in Pennsylvania. The company contended that it was not necessary for it to allege or prove the service of the statutory notice, Matteson being a non-resident of New York, and the question is squarely raised as to whether or not it was necessary to send the notice to Mr. Matteson, a resident of Pennsylvania, as the condition precedent to the right of the company to declare

the policy forfeited. The court disposed of the matter in the following brief paragraph:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. Aside from the provisions of the policy and under the general rules of law the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321, the Laws of 1877. This statute was a part of the contract in question, and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

Baxter *vs.* Insurance Company, 119th New York, 450, on p. 454.

The two cases above referred to clearly and distinctly show that the highest court of New York treats it as a limitation on the power of the corporation and makes it incumbent upon it to serve the statutory notice, no matter where the contract is made or the policy-holder resides.

Then can it be seriously urged that this statute did not make it compulsory upon the company to serve a notice upon Mr. Hill during his lifetime? It is immaterial whether the highest court of New York properly construed the law or not. Its construction of the law is binding upon every other court. But we maintain its decision is not only binding upon this and all other courts, but, further, that it is the proper construction of the statute, and the language of the act was susceptible of no other construction.

The language of the act clearly shows it was intended to limit the power of corporations to forfeit a contract insurance except in the manner provided by statute.

We further contend that this statute was, in effect, an amendment of the charter of every life insurance corporation chartered by the legislature of New York, and that even though the appellate court of New York had not passed upon the question and the question was to be here decided

for the first time, this court must hold that this statute was a limitation on the powers of the corporation to forfeit the contract except in the manner pointed out by the statute.

Appellant's contention that the statute was meant only to apply to contracts actually made in New York cannot be maintained. True, the laws of New York could only affect foreign insurance companies when they came within its dominion. It had no further control over them. But this corporation that the State gave being is controlled by it wherever it goes. Will plaintiff in error maintain that this corporation can step beyond New York and make a contract it cannot make in the home State? Does its power to contract along any line increase as it passes the border line of New York? Can it accept a contract from non-residents of the State of New York when it has no power and it would be unlawful for it to accept a like contract from a resident of its home State? All applications must be accepted at the home office in New York and the policies issued therefrom. Can it make any difference from whence the proposition comes—whether from inside or outside of the State? Its powers cannot be one whit greater outside than inside. The foreign State may further limit the power of such corporations as to business done in such State, but it cannot increase it. Does the State of Washington, when, as a matter of comity to other States, she permits the insurance corporations of such States to come within her borders to trade with her citizens, permit them to come in like freebooters, without any restraint from the law or charter of the home State, and especially from such provisions in such law or charter particularly provided for the protection of such parties who deal with such corporations?

This rule was adopted in a case reported in the 138 Pa.:

"It is urged, however, that this act of 1881 applies only to policies upon the lives or property of persons within this Commonwealth, and that as the property insured by the defendant was located in West Virginia, the rule above stated

does not apply. We regard this as a narrow construction of the act. We think that it was intended to produce a uniform rule of procedure, and to apply to all insurance companies incorporated by the laws of this State, and to all other insurance companies insuring lives or property within this State."

Hebb *vs.* Insurance Co., 138 Pa. St., 174, on p. 180.

The same rule is laid down by the supreme court of Maryland, in the decision reported in the 74th Maryland, in this language:

"But the statute of Pennsylvania, which was offered in evidence, enacts that in such cases no misrepresentation or untrue statement in the application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense, unless it relates to some matter material to the risk. It is beyond question that the powers and capabilities of a Pennsylvania corporation are conferred and regulated by the laws of that State; without its authority it could not exist at all. Every contract it makes, every act it performs, every right it acquires, and every obligation it assumes, must be by virtue of the same authority. It may make contracts, transact business, sue and be sued, beyond the limit of the State of its origin. But all these transactions are by the permission of the State where they occur, and not by virtue of any right belonging to the corporation. Everywhere within and without the State which created it, its contracts are limited, construed and sustained according to its charter and the laws which affect its operation. In McKine *vs.* Glen, 66 Mo, 484, this court said: 'It is a similar principle, that a corporation and all who deal with it are bound by the law of its creation, and all such laws may be legitimately prescribed by its government by the sovereign authority from which it derived its corporate existence.'"

Insurance Co. *vs.* Ficklin *et al.*, 74 Myd., 172, on p. 180.

A like rule is laid down by this court:

"Relfe is not an officer of the Missouri State court, but the person designated by law (the Missouri State law) to

take the property of any dissolved life-insurance corporation of that State and hold and dispose of it in trust for the use and benefit of creditors and other parties interested.

"*The law which clothed him with this trust was in legal effect part of the charter of the corporation.* He was the statutory successor of the corporation for the purpose of winding up its affairs. * * * We are aware that except by virtue of some statutory authority an administrator appointed in one State cannot generally sue in another, and a receiver appointed by a State has no extraterritorial power. But a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. * * * No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does without limitation, express or implied, the corporation comes in as it has been incorporated. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs, both in life and after dissolution."

Relfe *vs.* Rundle, 103 U. S., 222, pp. 225–'6.

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (Bank of Augusta *vs.* Earl, 13 Pet., 588), though it may do business in all places where its charter allows and the local laws do not forbid (Railroad *vs.* Kootz, 104 U. S., 12). But wherever it goes for business it carries its charter, as that is the law of its existence (Relfe *vs.* Rundle, 103 U. S., 226), and the charter is the same abroad as it is at home. Whatever disabilities are placed on the corporation at home it retains abroad, and whatever legislative control it is subject to at home it must be recognized and submitted to by those who deal with it elsewhere. * * * He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a

view to any other law with which they are not in entire harmony."

Canada S. R. R. *vs.* Gebhart, 109 U. S., 527, pp. 537–'8.

"It would seem, however, that the New York statute was intended to cut deeper, and as a matter of public policy to inhibit forfeitures by life insurance companies, except by the method therein provided.

"No life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of premium, etc., except as therein provided.

"The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not power to do, if attempted to be done by it, is *ultra vires*, and void.

"Admit that Griffith attempted to waive all notice of non-payment of premiums, if the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a waiver involves the right of the contracting parties to make and accept such waiver. Consent never gives jurisdiction not otherwise possessed of the subject-matter to a court, for the reason that it lacks the power to adjudicate such subject-matter, except as conferred by law.

"A corporation being the creature of the law must confine its functions to the limits prescribed for its action, and if the law expressly inhibits it from doing a given thing it is powerless to do that thing, and, if it can do it only in a given manner, the prescribed method becomes the measure of its power.

"We are not met with any suggestion that the statute in question is violative of any chartered right of the defendant, and, in the absence of a showing to the contrary, must assume the New York statute to be in consonance with its constitutional and chartered rights.

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be con-

strued to confer such power in the face of the law which has taken it away.

"The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Griffith *vs.* New York Life Ins. Co., 101 Cal., 627, on pp. 641–'2.

"The laws of New York (the statute regulating forfeiture of life insurance) would apply to contracts made by insurance companies chartered under its laws, whether the contracts were made in New York or in any other State in the Union."

Gunn *vs.* Miller, 26 S. W. (Tex.), 280, on p. 282.

"Appellee owes its existence to the constitution and laws of the State of Missouri, under and by virtue of which it obtained its being and from which it derived all its powers. Natural persons may make any contract or perform any act not prohibited by law, while artificial persons—corporations—can do only those things which by express grant or necessary implications they are authorized or empowered to do by the State under which their charters were obtained. * * * Had the contract been entered into by the president and secretary of the company, after resolution adopted by the board of directors authorizing them to make it, and had it been executed with strict observance of all formalities, it would have been void, because it was prohibited by the laws of the State from which appellee derives its existence and powers."

Rue *vs.* Missouri Pac. R'y Co., 74 Tex., 479.

See also—

Story on Conf. Laws, 174, 175, note *a*.
Matthews *vs.* Skinner, 62 Mo., 331.
Black *vs.* Canal Co., 22 N. J. Eq., 422.

THE STATUTE CANNOT BE WAIVED IN WRITING OR OTHERWISE.

In each of the following cases the insurance company contended that this New York statute could be waived. In each case the companies insisted that the contracts were made (as in this case) outside of New York, and hence the parties free to waive the statute. The courts in deciding the cases use the following language:

"It would, seem, however, that the New York statute was intended to cut deeper, and as a matter of public policy to inhibit forfeitures by life insurance companies, except by the method therein provided.

"No life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of premium, etc., except as therein provided.

"The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not power to do, if attempted to be done by it, is *ultra vires* and void.

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away."

Griffith *vs.* New York Life Ins. Co., 101 Cal., 627, on pp. 641–'2.

The supreme court of Michigan announced the same result in construing a policy of insurance made in New York and subject to a similar mode in reference to assessment societies passed in 1892. It uses the following language:

"The contract of insurance was made in the State of New York, and is governed by the laws of that State. * * * The notice sent to the insured, in the present case, did not

comply with this statutory provision. The design of the statute is apparent. A policy in regular life company fixes both the time of payment of premium and the amount thereof; yet that same statute provides that no life insurance company can declare forfeited or lapsed any policy by reason of the non-payment of any premium without notice, and prescribe what such notice must contain. It further provides that in case payment is made within the life of the notice, it shall be taken to be in full compliance with the requirements of the policy, anything therein contained to the contrary notwithstanding. Their statutory provisions form a part of the contract of insurance, and cannot be waived by the courts. Not having given such notice in the manner prescribed by the statute, it cannot be allowed to be declared a forfeiture of the policy by reason of its non-payment."

Warner *vs.* Life Association, 100 Michigan, 57.

"The statute of New York, (the one we are here considering) prescribes the conditions on which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived by the company, or the assured, or by both together (Society *vs.* Clements, 140 U. S., 226, 233; Hicks *vs.* Insurance Co., 9th C. C. A., 215; Griffith *vs.* Insurance Co. (Cal.), 36 Pac., 117; Warner *vs.* Association, 100 Mich., 157)."

Nixon *vs.* Insurance Company, 81 Federal (C. C. A.), 796, 802.

"Though a policy of life insurance was issued by a New York company to a citizen of Texas, containing a provision to the effect that, if any of the premiums were not paid when due, the policy would become void, and that notice that each premium would be due at the date named in the policy was given by the policy, and that any other notice required by any statute was thereby expressly waived, the statute of New York enacted in 1876 (requiring notice to be mailed to the assured at least thirty days before the premium was due, in order to cause a forfeiture) applied, and a notice sent 15 days before the premium was due was insufficient" (syllabus).

Insurance Co. *vs.* Smith (Texas), 41 Southwestern, 680.

"The policies, being New York contracts, were, of course, dominated by the statute respecting forfeitures, as completely as though the statutory conditions had been explicitly incorporated in them. The adjudications of the highest court of the State treat it as one which must be strictly interpreted in favor of the assured, and hold that the defense of a forfeiture through non payment of premium is not availing to an insurance company, if there has been any departure on its part from the provisions of the statute in regard to notice (Carter *vs.* Insurance Co., 110 N. Y., 15, 17 N. E., 396; Phelan *vs.* Insurance Co., 113 N. Y., 147, 20 N. E., 827; Baxter *vs.* Insurance Co., 119 N. Y., 551, 23 N. E., 1048; McDougall *vs.* Assurance Soc., 135 N. Y., 551, 32 N. E., 251; De Frece *vs.* Insurance Co., 136 N. Y., 144, 32 N. E., 556)."

Hicks *vs.* Insurance Co., 60 Federal, 692.

The following are cases in point. In each case except the Clement the contract was made outside of the State where the insurance company was incorporated, the statute being enacted by the State in which the company was incorporated, the same contention being made as here:

"It (the statute) is therefore as much a part of every contract insurance of life governed by the laws of the State of Ohio and made after that statute was passed, as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws, and no waiver of the parties nor stipulations in the contract can change the law (Hermany *vs.* Ins. Co., 151 Pa. State, 17; Ins. Co. *vs.* Ficklin, 74 Md., 172; Ins. Co. *vs.* Leslie, 47 Ohio State, 409; White *vs.* Society, 163 Mass., 108)."

Insurance Co. *vs.* Pollard, 26 Southeastern, 421, p. 422.

"In other words, the statute is to be entirely overthrown and set aside; and the insurance company under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way. If an untrue statement material to the risk is warranted, the policy is void; but the invalidity of the policy

depends upon the fact whether the statement is material to the risk. The materiality of the statement is the indispensable condition on which the invalidity of the policy depends, and it must be established by proof. It is not competent to substitute for this proof an agreement of the parties that it should be considered material. Neither can an agreement be valid which gives an effect to a warranty, which is in defiance of the statute. The legislature enacted a rule for the regulations of the contracts of insurance companies, which is a matter of public interest and concern. The operation of this rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts; on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from them."

Fidelity Ins. Co. *vs.* Ficklin, 74 Md., 172, on pp. 185–'6.

"It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium after three premiums have been paid, as well as the insertion, in the application, of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not, is an ineffectual attempt to evade and nullify the clear words of the statute.'"

Insurance Co. *vs.* Clemens, 140 U. S., 226, on p. 234.

"The evident purpose of this legislation was to strike down, in this class of cases, literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. This provides a rule of construction for the purpose of preventing injustice; and it is as much the duty of courts to enforce such rules as it is to administer the statutes of frauds and perjuries. It would be contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver such as was insisted on in this case. The court was therefore right in holding that the waiver was invalid."

Hermany *vs.* Life Association, 151 Penn., 17, on p. 24.

Judge Brewer, when sitting as circuit judge in the western district of Missouri, had occason to review this question, and in a very able opinion says:

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce (Railway Co. *vs.* Peavey, 29 Kan., 169). The legislature has by this language declared a rule in respect to forfeitures in life-insurance policies; it has thus established the policy which it believes should obtain in this State, and, though sitting on the Federal bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit."

Wall *vs.* Equitable Assur. Soc., 32 Fed., 273, on p. 277.

"A contract which is illegal and void, either by the law of the place where it is made, or that of the place where it is performed, is illegal and void everywhere."

Hyde *vs.* Goodnow, 3 N. Y., 266–269.

This decision, having been announced prior to the execution of this contract, was as much a part of the contract as the statute. The company knew that such would be the construction of the contract by the courts of that State whenever it undertook to enforce the forfeiture provision of the policy in New York, where it alone could exact a forfeiture.

"A contract for a loan made payable in a foreign country may stipulate for interest higher than allowed at home, and if the contract is illegal there it will be illegal everywhere."

Bank of Louisville *vs.* Young, 37 Mo., 378.

In a case decided in the supreme court of Massachusetts, Justice Carey uses this language:

"The notes in suit having been made and payable in Louisiana, the question of the validity depends upon the law of that State. If they are void by that law, they are void everywhere."

Stevenson *vs.* Payne, 109 Mass., 378.

Such a construction of the contract can do no injustice to the insurance company. The insurance company, being a citizen of New York, is conclusively presumed to have known the statutes and public policy of that State. It drew the contract in such form, and in express words made it subject to the laws of New York. It knew that the courts of New York, as well as any other court, would not enforce a contract of forfeiture within New York except in compliance with its laws. It knew it was inserting in this contract an agreement in entire disregard of the public policy of the State in which it had caused the contract to be performed. This court must decide this case and enforce this contract just as the courts of New York would if the matter was before them. Would the appellate court of New York enforce a forfeiture of contract to be performed in New York contrary to and in entire disregard of the public policy and statutes of that State?

Similar quotations might be made from many other courts, some of which we will have occasion to cite subsequently in discussing other points.

We will at this point add the following references:

Reilly *vs.* Insurance Co., 43 Wisconsin, 449.
Chamberlain *vs.* Insurance Co., 55 N. H., 249.
Emery *vs.* Insurance Co., 52 Me., 322.
White *vs.* Insurance Co., 4 Dil., 177.
Ins. Co. *vs.* Leslie, 47 Ohio St., 409.
White *vs.* Society, 163 Mass., 108.
Ins. Co. *vs.* Rudwig, 80 Ky., 223, 233–'5.
Ins. Co. *vs.* Smith, 41 S. W., 680.

THE ALLEGED DEFENSE OF ESTOPPEL CANNOT PREVAIL AGAINST BENEFICIARIES, DEFENDANTS IN ERROR; CONDUCT OF MR. HILL WOULD NOT ESTOP THEM.

The company insists that by the alleged conduct of Mr. Hill subsequent to the issuance of the policy Mr. Hill waived the service of the statutory notice and the beneficiaries are estopped from enforcing the contract.

We have shown that the contract cannot thus be waived. If the contract cannot be waived in writing, it cannot, for obvious reasons, be waived in any other manner. But there is another and complete answer.

The moment the policy was issued and delivered it belonged to the beneficiaries. They had a right to pay the premiums and keep it alive. Any declaration or statement he might make would not bind or estop them. This court has well stated the rule as follows:

"And it is a general rule that a policy and the money that may become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment, or will, to surrender the policy and issue a new one, or by other act, to transfer to any other person the interest of the person named."

Wash. Bank *vs.* Hume, 128 U. S., 195, on p. 207.

Mr. Bacon, in his admirable work on Insurance, says:

"When a policy of insurance is taken out payable to some other person than the assured, the beneficiary ordinarily has a vested right in the policy and its proceeds, consequently the assured cannot in any way control or dispose of the policy. A leading writer on the subject says (Bliss on Life Ins., 318): 'We apprehend the general rule to be that a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiaries, and that there is no power in the person

procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created. The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor, if it is expressed to be for the benefit of some one else.' And this statement is cited and approved by the supreme court of Indiana (Hanley *vs.* Heist, 86 Ind., 196; Am. Rep., 286; Holland *vs.* Taylor, 111 Ind., 121). In a case arising in Massachusetts, where, in pursuance of an understanding with the mother of the insured, he took out a policy payable to her, but, upon his subsequent marriage, surrendered it and received a new one payable to the wife, it was held that the mother's rights were not affected. In this case (Pingrey *vs.* National Life Ins. Co., 144 Mass., 381; 11 N. East. Rep., 111 Ind. 121), the court said: 'There appears to have been a full understanding between him (the assured) and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact it was made payable to her, and this was done with the intention of giving her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might, indeed, afterwards fail to pay the annual premiums. This, however, does not prevent it from being a good trust. An unrevoked trust is valid, even though there is an express power of revocation' (Stone *vs.* Hachett, 12 Gray, 227). In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two full annual premiums, it would not lapse, and certain valuable rights would still exist under it. Under the circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority," citing numerous authorities.

Bacon on Ins., vol. 1, sec. 292.

To the same effect is:

May on Ins., vol. II, sec. 399 L; also sec. 399 P.
Wash. Bank *vs.* Hume, 128 U. S., 195.
Glanz *vs.* Gloeckler, 104 Ill., 573.
Gould *vs.* Emerson, 99 Mass., 155.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Whitehead *vs.* Ins. Co., 123 N. Y., 156.
Ins. Co. *vs.* Smith, 44 Ohio St., 146.
Garner *vs.* Ins. Co., 110 N. Y., 266.
Pilcher *vs.* Ins. Co., 33 La., 322.

THE DEFENSE DOES NOT SHOW FACTS SUFFICIENT TO SHOW AN ESTOPPEL OR WAIVER.

All the text-writers agree that to establish the estoppel suggested by this defense all the following elements must appear:

"1. There must have been false representation or a concealment of material facts.

"2. The representation must have been made with knowledge, actual or virtual, of the facts.

"3. The party to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter.

"4. It must have been made with the intention, actual or virtual, that the other party should act upon it.

"5. The other party must have been induced to act upon it" (Bigelow on Estoppel, p. 570; Pomeroy, Eq. of Jur., 1st ed., sec. 805; Bacon on Ins., 2nd ed., sec. 420; May on Ins., 3rd ed., sec. 507, and cases cited by the above authorities.)

(1.) It is useless to point out wherein the alleged defense fails under the above rules, for it fails in them all. If any one was guilty of false representations, it was the company. (2.) The insured could not have been aware of the facts; if ever admitted, the policy was forfeited; the company was if

any such admission was made by the insured. (3.) It could not have been done with the intent that the company would act upon it. It had already declared the policy forfeited. (4.) The insurance company was not ignorant of the fact of non-forfeiture. (5.) It does not claim to have acted or refrained from sending the notice on that account.

THE STATUTE IN QUESTION DOES NOT COVER THE STATUTE RELATIVE TO RESERVE, BUT BOTH WORK IN ENTIRE HARMONY.

The company urges with considerable zeal that it was the purpose of the legislature, in enacting the law, to protect from forfeiture such portion of the policy as the premiums had already purchased. If such was the intention of the legislature, it knew but little about the English language when it enacted the law.

1. If that had been the intention of the legislature, it would have used language appropriate to express such an intent.

2. The language of the act is susceptible of no such construction.

3. No assignment of error was made touching this point, and nothing is in the record upon which such a claim can be based.

4. The legislature did pass a law on the 21st day of May, 1879 (chapter 347, Laws of the State of New York), which explicitly covers and protects the policy-holder as to the reserve on his policy. The two statutes work together in entire harmony, and the one does not cover the evil protected by the other. The Sears and Cohen cases well illustrate this and at the same time show the wisdom of the legislature in enacting each statute.

Mr. Cohen took out his policy on the 10th day of June, 1885, and paid seven and one-half years' premiums, but failed to pay the semi-annual premium on December 10, 1892. It will be noticed the policy is a semi-endowment twenty-year policy. The premiums are very heavy and the reserve is correspondingly large. This reserve, if used to purchase extended insurance, under the New York statute, would carry the policy for its full face for at least thirteen years and 130 days, the company still retaining as forfeited all dividends and one-third of the reserve. Flitcraft's Manual of Life Insurance, page —, 1895 edition (Missouri statutes and New York being practically the same). This would have continued Mr. Cohen's policy of $3,000 in full force and effect until about May, 1906, or nine years beyond his death, although having paid his full share of expenses of the company and the company still forfeiting, as it legally may do under the statutes, one-third of the reserve and all the dividends and accumulations on the policy, or Mr. Cohen could have surrendered his policy, under the New York statute, six months after he had been put in default by service of the statutory notice, and received a paid-up policy for over one thousand dollars, payable at his death.

But if the defense of a forfeiture prevails, all this is lost to the insured, because if the policy was forfeited during the lifetime of Mr. Cohen it was forfeited on the 10th day of December, 1892, and more than six months had elapsed before his death. So it would be useless for plaintiff to allege or prove the time which the reserve would purchase extended insurance or the amount of paid-up insurance.

But the company did not serve the notice and the policy was not forfeited; so it was never necessary for Mr. Cohen to surrender the policy and obtain a new one, either for paid-up or extended insurance. He could delay surrendering the policy until fully six months after the service of the statu-

tory notice. He had the thirty days after the service of the notice to elect to make further payments and six months after the termination of the thirty days to elect whether he would take paid-up or extended insurance. Mr. Sears had paid two and a half annual premiums on a ten-payment life policy, the premiums being $491 per annum. The payment of the half a year's premium more under the New York law would have entitled him to surrender it and take a paid-up policy for $3,000 or extended insurance for nearly nine years.

See Flitcraft, 1885 ed., p. 526.

This money could have been borrowed from any reputable company or from almost any bank with the policy as security.

But the fact remains that reserve on the premiums actually paid for two years (omitting all consideration of the first half of the third year's premium, as parts of years are not considered in fixing the amount of either paid-up or extended insurance), which was unused, was sufficient to have carried the policy beyond his death.

Under the non-forfeiting law of Missouri, the first two premiums would have carried the full policy for five years, 118 days beyond the 18th day of May, 1893, or six months beyond his death.

Flitcraft Life Insurance Manual, 1895 ed., 526.

Under any ten-pay life policy issued by the Mutual Benefit Life Insurance Company of Newark, New Jersey, after the payment of two years' premiums (the premiums being a few dollars less), the policy would have been extended by its own terms automatically, without any surrender of the policy or other act on the part of the insured, seven years and twenty-six days, or until the month of June, 1900, over two years beyond his death; the difference in the length of time being due to the fact, as stated, that the statute gives the company

the benefit of a forfeiture of two-thirds the reserve, while this company gives the full value of the reserve.

The same is practically true of policies of the New York Life, Penn Mutual, and other companies.

While the plaintiff cannot claim the benefit of the statute of Missouri or the contract issued by the Mutual Benefit Company or the New York Life, it shows conclusively that the company was fully paid for the ten thousand dollars' insurance during his life. Besides, the company has been allowed all deferred premiums, amounting to over twenty-five hundred dollars, which is that much more than it cost them to carry all its policy-holders at the same age for the same length of time on similar policies.

But the defendant in error can claim the benefit of the laws of New York, while the non-forfeiture law of New York does not give the insured the benefit of the reserve unless he surrender the policy and take out a new one (in this it is more favorable to the insurance company than like statutes of other States, in fact it requires an utterly useless act), but its other law relative to notice does leave the policy in force. While the insured is held to a strict compliance of the law as to surrender of policy for new one in case of lapse, the company, on the other hand, is held to a strict compliance with reference to notice before it may declare a policy lapsed or forfeited. We think we have clearly shown that the defense pleaded is not open to the company. Mr. Sears, Mr. Cohen, Mr. Hill are all dead. If any agent should testify to the facts alleged in the answer how are we to meet it? We cannot get their version of what happened nor can such evidence be met in any case arising under the statute. Other cases might better illustrate the wisdom of taking from the insurance company the power to terminate or forfeit a contract in this manner. But we think these are sufficient to show the statute ought not to be lightly set aside. If the company had followed the method provided in the statute and the insured had

failed to protect himself, whether from ignorance or otherwise, our contracts would have ended, though a hardship would have resulted in each case. But it did not. It claims to have acted in entire disregard of the statute. It offers a defense that is prohibited by the statute. The statute saves to the insured the full benefit of a contract for which he has paid. We cannot close this point better than to quote the words of this court:

"The statute of New York prescribes the condition upon which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company, or the assured, or by both together."
Equitable Life *vs.* Nixon, 81 Fed., 802.

To read the brief of the petitioner one might be persuaded that it meant what it said about "exact justice," and that it would always pay a policy, no matter whether there had been a technical surrender of the old for a new, so long as the insured had paid an amount sufficient to carry his risk beyond his death. Not so. They have fought these two cases through two courts, and are asking leave to litigate them still further in this court. This company never does give a policy-holder the benefit of paid-up or extended insurance, though the policy may have carried for many years and the reserve amounts to a large percentage of the face of the policy, unless the insured strictly and technically complies with the requirements of the statute.

IT WAS NOT NECESSARY FOR PLAINTIFF TO ALLEGE OR PROVE THE PAYMENT OF PREMIUMS SUBSEQUENT TO THE FIRST.

Under the New York statute no premium was due and payable on the contract until the service of the statutory notice by plaintiff in error. The receipt of the payment of the first premium is acknowledged in the policy; the con-

tract continued in force and could not be forfeited except in the manner provided by the statute. That is the service of the statutory notice by plaintiff in error and the non-payment of the premium in pursuance to such notice.

The service of this notice was a condition precedent to the right of the insurance company to declare a forfeiture. Hence before the company could defend on the ground of forfeiture it was incumbent on it to allege and prove that it performed the necessary acts to entitle it to declare a forfeiture of the contract. Whether it did send the notice was a fact peculiarly within its own knowledge. The burden of sending the notice was upon it, and if it would claim the benefit of such an act it must allege and prove it performed it. This question was before the court of appeals of New York in the case of Baxter *vs.* Ins. Co. The pleadings were practically identical with the pleadings in this case. In fact we followed that decision, believing that any court that would be called upon to construe the statute of New York would follow the decision of the highest court of that State, and, more than that, we believe it to be a good law. In this case as that the unpaid premiums, with interest, were deducted from the amount that otherwise would have obtained. We file with this brief certified copies of the pleadings and record. We will quote very fully from that case.

"The complaint alleged the delivery of this contract to the insured, his death on the 7th day of September, 1884, the presentation to the defendant of satisfactory proofs of death, according to the terms of the policy, the refusal of the defendant to pay, and that the insured had made payments of premium according to his agreement with the defendant. No issue was made by the defendant upon any of the allegations of the complaint except the averment that the insured had paid the premiums according to the terms of the policy, which it denied, and specially alleged that the premiums which became due on the 24th day of August, 1884, had not been paid (almost the identical language of the pleadings in this case). * * *

"There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute when imported into the contract modified its conditions in very material respects. The duration and validity of the policy is not then dependent upon payment of the premium on the day named therein, but upon payment thirty days after the notice had been given. The condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium within thirty days after notice. The statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. *In the absence of proof, on the part of the defendant, as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and the statute when read together.* Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential to put the insured in default, or raise any point based on his omission to pay the last quarterly premium.

"*It must, therefore, be assumed, in the absence of such notice, that the policy in question was in full force at the death of the insured*, and even if the payment of the last premium was omitted the obligation and promise of the defendant to pay upon death, during the life of the policy, was unimpaired. The purpose of the statute referred to was to establish a rule which would preserve to the assured the benefits of premiums paid, and to prevent the lapse of policies of life insurance without ample notice, and an opportunity to save them from forfeiture by payment of premiums due within the specified time, and at the same time secure the company, in case it is obliged to pay, the full amount of the premium which the policy calls for. When the provisions of this statute are adopted in a contract of insurance, for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then the clause and these conditions should be so construed

as to give to the assured the full benefit contemplated without altering any other provision of the policy, if this can be done without violating any rules of law. When the scope and purpose of the law as deducted from the decision of the court and the courts of other States involving a construction of the same or similar statutes is considered, no good reason is perceived for interfering with the result in this case in the court below (Phelan *vs.* N. M. L. Ins. Co., 113 N. Y., 147; Carter *vs.* Brooklyn Life Ins. Co., 110 *id.*, 15; Carter *vs.* John Hancock Mutual Life Ins. Co., 127 Mass., 153; Boyd *vs.* Cedar Rapids Ins. Co., 70 Ia., 325).

"*It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the 24th day of August prior to the death of the insured.* If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured or her assignee, except to present to the defendant the proofs of death required by the policy. The contract was kept in life by force of the statute, until the contingency upon which the payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This put the defendant in precisely the same position in which it would have been if the premium had been duly paid (Carter *vs.* John Hancock M. Life Ins. Co., *supra*).

"It was conceded upon the argument in this case that the unpaid premium (which is true in this case), and interest thereon, was deducted from the verdict, and thus no injustice has been done.

"The judgment should be affirmed."

Baxter *vs.* Insurance Co., 119 N. Y., 450, on pp. 453–7.

In a still later case this decision was upheld by the same court, in which all the justices concurred. The following quotation states the necessary facts:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the

annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frece *vs.* Insurance Co., 136 N. Y., 144, on page 151.

The Supreme Court of the United States has held, in a long line of cases, that where the highest court of a State has construed a statute of that State, such construction is binding on all other courts, and becomes as much a part of the statute as though actually incorporated into it.

The supreme court of Washington has sustained the above proposition.

Greismer *vs.* Mutual Life Insurance Co., 10 Wash., 202, on page 210.

It will be thus seen that the highest court, both of Washington and New York, has held our form of pleading is correct. Defendant in error, living in the State of Washington, had a right to rely on these authorities as establishing the law of the case and upon which she could rest with absolute confidence, one being the law of the place of the contract, the other the law of the forum. This plaintiff was familiar with these decisions when she commenced this action. No court will tell her she is in error in relying upon them confidently as settling the questions. Would it not be doing her a great wrong and injustice to dismiss her action and compel her to tender a premium on a contract that the company has repudiated, and that, too, contrary to the laws of the place of contract and the forum as well. Further than this the decisions of both States are in entire harmony with numerous other courts.

Each of the following cases supports our contention:

Osborne *vs.* Ins. Co., 67 Pac. (Cal.), 616.
Ins. Co. *vs.* Mullen, 34 S. W., 605.
Griffith *vs.* Insurance Co., 101 Cal., 621.
Nixon *vs.* Insurance Co. (C. C. A.), 81 Fed., 796, 802.
Griesmer *vs.* Insurance Co., 10 Wash., 202.
Warner *vs.* Insurance Co., 100 Mich., 167, 159, 160.

NO TENDER OF THE PREMIUM WAS NECESSARY BEFORE BRINGING SUIT.

The above authorities hold that it was unnecessary to tender unpaid premiums before commencing action. There is another good and sufficient reason. When the company was notified of the death of the insured it denied all liability on the contract, and elected to stand on the ground that the policy was forfeited. Having assumed this attitude, a tender was unnecessary. The United States Supreme Court states the rules as follows:

"The proposition is thus expressed by this court at its last term, in Hill *vs.* Exchange Bank, 105 U. S., 319, as a result of the cases above cited. 'It is a general rule that when the tender of the performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.'"

Kauffman *vs.* Lee, 106 U. S., 196, on page 202.

The above is fully supported by the cases of:

United States *vs.* Peck, 102 U. S., 64.
Poindexter *vs.* Greenhow, 114 U. S., 270–282.
Lawrence *vs.* Miller, 86 New York, 136.
Insurance Co. *vs.* Vining, 7 C. C. A., 359.
Insurance Co. *vs.* Smith (Ohio), 5 Northwestern, 417.

IT WAS NOT NECESSARY TO PLEAD OR PROVE THE STATUTE OF NEW YORK. THERE WAS NO DEPARTURE FROM LAW TO LAW OR FACT TO FACT.

It is a rule of law as old as the courts of the United States that it is unnecessary to aver or prove the laws of any State of the Union. It is only necessary to show that a contract is governed by the laws of a particular State, and then plead the facts that would entitle the pleader to recover if the action was brought in the courts of such State.

In this case plaintiff pleads (paragraph IV, p. 4) that the plaintiff in error is incorporated under the laws of New York. It further alleges in paragraph V that the defendant made, executed, and delivered in the city of New York and State of New York a certain contract or policy of insurance. It then sets forth the policy *hæc verba*, which provides the company shall pay its contract of $20,000 in the city of New York. The insured is to pay all the future premiums in the city of New York. The policy recites that it is executed in New York; that proofs of death are to be submitted to it at its home office in New York. The policy also provides that after the payment of certain premiums it will issue a paid-up policy for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

In paragraph VI of the complaint plaintiff alleges as follows:

"That the application referred to is not in the hands of plaintiffs, but is in the hands and possession of defendant and plaintiffs cannot set forth a copy thereof, but plaintiffs allege that the said application contained the following agreement and words: *That the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York.*"

These facts were pleaded in the original complaint and placed the contract directly under the laws of New York. It shows the plaintiff was relying on the contract and all the laws of New York that were operative on a contract of such nature. We have shown under point two of this brief that we followed, in pleading our case under this law, the rule as settled by the highest court of the State of New York and the State of Washington on similar contracts. It is very evident that the plaintiff in error so understood the pleading, because in its answer it avers as follows, page 21 :

"This defendant alleges that the said plaintiffs, and each of them, should be and are estopped from and should not be permitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise given to said George Dana Hill a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that unless the premium then due should be paid to the company, or its agents, within thirty days after the mailing of such notice, the policy, and all payments made thereon, should become forfeited, or any other notice prescribed by any statute or statutes of the State of New York.

"It would be hard to conceive of a pleading in which more facts are plead showing that a certain contract was wholly governed by the laws of a particular State. We have shown in the first point in this brief that these facts, being admitted as they are, this court is bound as a matter of law to pronounce it a New York contract. Having plead the facts we can claim the benefit of any New York law which is to our advantage."

The opinion of Judge Hawley, in the court below, is a complete answer to petitioner's argument, a part of which is as follows:

"In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this: that the plaintiff's right of

recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance. The cause of action as set out in the complaint was based upon the identical facts upon which the court gave judgment. There was, therefore, no departure in this case, either from fact to fact, or from law to law, and hence, the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several States. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense."

Record, p. 63.

Our cause of action was based on the policy of insurance as construed and controlled by the laws of the place of contract, which by our pleadings we showed to be in the State of New York, the laws of which State we clearly alleged we were relying upon. We plead all the facts necessary to be plead if we were suing in the courts of that State. This brings us clearly within the decisions of this court.

"And in further affirmation of the doctrine here laid down, we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several States of this Union, and that with respect to these, *nothing is required to be specially averred in pleading which would not be so required by the tribunals of those States respectively.*"

Pennington *vs.* Gibson, 16 Howard, 65.

"The Federal courts take judicial notice of the laws of all States, and it is only necessary that the pleadings show a state of facts to which any statute of the Union applies, *because those laws are known to the court below as laws alone, needing no averment proof.*"

Course *vs.* Stead, 4 Dall., 22, 27 (4 U. S. Bk. 1, L. ed., 724, 726).

Hanley *vs.* Donohue, 116 U. S., 1–6.

"*The law of any State of the Union, whether depending upon statutes or upon judicial opinion, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.*"

Owings *vs.* Hull, 9 Pet., 607.
Pennington *vs.* Gibson, 16 How., 65.
Draw Bridge Co. *vs.* Sheperd, 20 How., 227 (61 U. S. Bk. 15, L. ed., 396).
Lamar *vs.* Micou, 114 U. S., 218.

"With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only to be said that the courts of the United States take judicial notice of all the public statutes of the several States."

Gormuly *vs.* Bunyan, 138 U. S., 623.

In an earlier case the court uses this language:

"In the court below statutes and decisions of Rhode Island were agreed or proved and found as facts in seeming forgetfulness of the settled rule that the circuit court of the United States, as well as this on appeal or error from that court, takes judicial notice of the laws of every State of the Union. Hanley *vs.* Donoghue, 116 U. S., 1, 6 (29 : 535, 537), and cases there collected. No reference was made to the statute of 187–, chap. 600, to which the plaintiff has now referred and which repeals and modifies in some respects the statutes agreed and found in the record to be still in force; and it is contended for the defendant that this court should not review a judgment on a ground which was not presented to the court below. That is doubtless the general rule. Klein *vs.* Russell, 86 U. S., 19 Wall., 433 (22 : 116); Badger *vs.* Ranlett, 196 U. S., 255 (27 : 191). But it would be unreasonable to apply it when then the effect would be to make the rights of the parties depend upon the statute which, as we know, and are judicially bound to know, is not the statute that governs the case."

Bank *vs.* Franklyn, 120 U. S., 747.

"We are of the opinion that the circuit court was bound to take judicial notice of the laws of Louisiana. The circuit courts of the United States are created by Congress, not

for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union, in cases to which they respectively apply. The judicial power conferred on the General Government by the Constitution, extends to many cases arising under the laws of the different States. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. This jurisprudence is, then, in no just sense, a foreign jurisprudence to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; *but it is judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.*"

Owings *vs.* Hull, 9 Pet., 607, on p. 625.

To the same effect are the following:

Gordon *vs.* Hobart, 2 Sumn., 401.
Woodworth *v.* Spaffords, 2 McLean, 168.
Jasper *v.* Porter, 2 McLean, 579.
Jones *v.* Hays, 4 McLean, 521.
Mewster *v.* Spalding, 6 McLean, 24.
Merrill *v.* Dawson, Hempst., 563.
Harpending *v.* Reformed Dutch Church, 16 Pet., 455.
Covington Draw Bridge Co. *v.* Sheperd, 20 How., 227.
Beatty *vs.* Knowler, 4 Pet., 152.
United States *vs.* Perot, 8 Otto, 428.
U. S. *vs.* Turner, 11 How., 663–668, 13, 856–'9.
Chever *vs.* Wilson, 9 Wall., 108–19–604.
McNeil *vs.* Hollbrook, 12 Pet., 84.
Christmas *vs.* Russel, 5 Wall., 302.
Ellwood *vs.* Flanigan, 104 U. S., 562.

The Weyler case does not pretend to change the above rule, nor is there the slightest conflict between it and the decision of the lower courts.

Our cause of action arises on the contract set out in the complaint as a New York contract; plead all the facts

showing that was a New York contract; plead specially the stipulation in the application by which it was agreed that it was subject to all the laws of New York applicable to it. It was not necessary to prove the statute; then why plead it, as the court says such general statutes need neither averment nor proof.

As we have shown, we followed the form of pleading to bring us within the statute as adopted by the highest court of New York and Washington.

Baxter *vs.* Ins. Co (*supra*), 119 N. Y., 450.
De Frece *vs.* Ins. Co. (*supra*), 136 N. Y., 144.
Phelan *vs.* Ins. Co. (*supra*), 112 N. Y., 147.
Griesmer *vs.* Ins. Co. (*supra*), 10 Wash., 202.

In conclusion, we again urge upon this court that this case does not raise any question of sufficient importance to call for a decision. It clearly belongs to that class of cases where this court has repeatedly said the judgments of the circuit courts of appeals should be final; more than this, the judgment of the circuit court of appeals was right and in conformity to the settled law. Nor should the petitioners be put to an additional expense trying this case here, contrary, as we believe, to the intent and purpose of the act of 1891.

Respectfully submitted.

S. WARBURTON,
Attorney for Defendants in Error.

EBEN SMITH, *Of Counsel.*

Office Supreme Court U. S.
FILED
MAR 14 1900
JAMES H. McKENNEY,
Clerk.

No. 453.

Brf. of Warburton for D. C.

Filed Mar. 14, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 453.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

GEORGE E. HILL, HELEN K. HILL, AND E. C. HILL ET AL., BY THEIR GUARDIAN, EBEN SMITH, DEFENDANTS IN ERROR.

S. WARBURTON,
Attorney for Defendants in Error.

EBEN SMITH, *Of Counsel.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-14-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 453.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

GEORGE E. HILL ET AL., DEFENDANTS IN ERROR.

STATEMENT.

In this brief we will only call the court's attention to the points of difference between this case and the Sears, and will only discuss those points of law wherein it differs from the Sears case.

This case differs from the Sears case in the following:

1. THERE IS NO PRETENSE OR CLAIM UP TO DATE THAT THE STATUTE OF 1897 HAS ANY APPLICATION TO THIS CASE. IN FACT, THIS ACTION WAS BEGUN IN 1895, TWO YEARS BEFORE THE PASSAGE OF THE ACT OF 1897.

2. THE POLICY WAS PAYABLE TO THE WIFE AND MINOR CHILDREN, WHO WERE THE REAL PARTIES IN INTEREST IN THE CONTRACT, AND THE ALLEGED DEFENSE OF ESTOPPEL CANNOT AFFECT THEM. IT IS NOT CLAIMED THAT THEY DID OR SAID ANYTHING TO ESTOP THEM FROM ENFORCING THE POLICY.

ARGUMENT.

I.

NEW YORK WAS THE PLACE OF CONTRACT, AND THE STATUTE OF 1877 WAS A PART OF THE CONTRACT.

In this case, as in the Sears, the contract was to be wholly performed in New York. The stipulation in the application contained the following agreement:

"*And the contract of insurance when made shall be held at and construed at all times and places to have been made in New York.*"

Our brief in the Sears case, pages 4–13, inclusive, fully covers the argument on this point, if any be needed, in view of the admission made by plaintiff in error on page 72, inclusive, in its Cohen brief, its principal brief in the argument of the Sears, Cohen, and Hill cases, as follows:

"Cohen defaulted June, 1893, 1894, 1895, 1896. No notice having been sent the policy was not forfeited. This was the condition of things on June 10, 1896, and would have continued unless the legislature had intervened. During 1896 Cohen could at any time have paid up his premiums with interest, and restored his policy. *He had no other rights.* By the terms of his contract it was forfeited, but the statute as to notice held this forfeiture as it were in suspense. It did not relieve him from the obligation to pay his premiums. It simply prevented the contracted effect of non-payment from taking place. There was no vested right in this effect. Cohen could say I paid no premium, but you have sent no notice, therefore my contract cannot be forfeited for that non-payment. We must admit that but for the act of 1897 the Cohen policy could not be forfeited for non-payment of the premium of June, 1896, until the statute of limitations had run, and it is not now important to determine whether that statute was the legal or equitable statute."

II.

THE STATUTE OF 1877 WAS A LIMITATION ON THE POWER OF THE CORPORATION TO FORFEIT CONTRACTS OF INSURANCE, EXCEPT IN CONFORMITY TO THE METHOD PROVIDED BY THE ACT.

This point is fully covered on pages 13–30, inclusive, Sears' brief.

III.

THE STATUTE COULD NOT BE WAIVED BY AN EXPRESS PROVISION OF THE POLICY TO THAT EFFECT.

This point is also fully covered in the Sears brief, pages 31–40, inclusive.

IV.

IT WAS NOT NECESSARY TO ALLEGE OR PROVE THE PAYMENT OF THE PREMIUMS. IT WAS NOT NECESSARY TO ALLEGE OR PROVE THE STATUTE OF NEW YORK; NEITHER WAS THERE A DEPARTURE FROM LAW TO LAW.

This point is fully covered by the argument in the Sears brief, pages 111–121, inclusive.

V.

THE PLAINTIFF IN ERROR DID NOT PLEAD AN ESTOPPEL IN EITHER TWO OF ITS AFFIRMATIVE DEFENSES, NOR CAN AN ESTOPPEL OR WAIVER BE PREDICATED ON FACTS WHICH WOULD ORDINARILY AMOUNT TO A WAIVER IF CONTRARY TO A STATUTE OR PUBLIC POLICY LAW.

These points are fully covered in the Sears brief, pages 40–111, inclusive.

VI.

THE ALLEGED DEFENSE OF ESTOPPEL CANNOT PREVAIL AGAINST BENEFICIARIES, DEFENDANTS IN ERROR; CONDUCT OF MR. HILL WOULD NOT ESTOP THEM.

The company insists that by the alleged conduct of Mr. Hill subsequent to the issuance of the policy Mr. Hill waived the service of the statutory notice and the beneficiaries are estopped from enforcing the contract.

Counsel for plaintiff, in its brief in this case, makes the following argument against this proposition. We quote its argument:

"The question is not whether Hill could surrender a live policy without the wife's or children's consent. This policy was lapsed and forfeited by its terms, and by such terms the wife and children had no interest. The lack of notice to Hill himself is claimed to keep it alive, and the only question is whether the person entitled to notice may not so conduct himself as to render lack of notice to *him* inoperative. Hill was under no obligation to his wife and children to pay the premium, and likewise he could be under no obligation to them to do or abstain from doing anything which would render the lack of notice operative or inoperative" (plaintiff in error's brief, Hill case, p. 19).

Probably, so far as the defendant in error is concerned, as forcible an answer as can be made is to quote from the plaintiff in error's brief in the Phinney case, now before this court. Speaking of this same question of estoppel (the same attorneys appear on the cover of the brief in that case), it admits that such a defense cannot prevail against a beneficiary, for under the following heading—

("THE DEFENDANT IN ERROR IS ESTOPPED FROM ASSERTING ANY CLAIM UNDER THE POLICY IN SUIT, FOR THE REASON THAT HER TESTATOR HAD ABANDONED AND SURRENDERED

THE POLICY AS AN EXISTING CONTRACT LONG BEFORE HIS DEATH "—Phinney Brief, p. 143)—

it says:

"This might not apply to cases where one has insured his life for another's benefit, for, as was said in Griffith *vs.* Ins. Co. (101 Cal., at p. 638), 'the doctrine is well settled that when a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance on his own life, payable to another, the insured cannot surrender the policy without the consent of the beneficiary.'"

Phinney brief, plaintiff in error, p. 143.

This quotation from the Phinney brief is the well-settled law; the one from the Hill brief is not. Mrs. Hill, the first beneficiary, had a right to pay the premium at any time before default according to the contract and the statute taken together. The *minor children* or any one in their behalf had a like right to pay the premium at any time before legal default. This right could not be taken from any one of them by the express contract of Mr. Hill, much less in the manner suggested by the answer. Their right to pay before default, as a fact (not what Mr. Hill might say about it), could not be taken from them, at least from the minor children, except by order of court, through their guardian. It is a fact, as appears by the complaint, that Mrs. Hill died before her husband, Mr. Hill; that fact only emphasizes the claim we make that a minor's interest in a contract could not in any manner be impaired by the statements of some third party. The following authorities fully sustain our claim as well as the statement of law quoted above from the brief of plaintiff in error in the Phinney brief.

This court has well stated the rule as follows:

"And it is a general rule that a policy and the money that may become due under it belong the moment it is

issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment, or will, to surrender the policy and issue a new one, or by other act, to transfer to any other person the interest of the person named."

Wash. Bank *vs.* Hume, 128 U. S., 195, on p. 207.

Mr. Bacon, in his admirable work on Insurance, says:

"When a policy of insurance is taken out payable to some other person than the assured, the beneficiary ordinarily has a vested right in the policy and in its proceeds, consequently the assured cannot in any way control or dispose of the policy. A leading writer on the subject says (Bliss on Life Ins., 318): 'We apprehend the general rule to be that a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created. The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor, if it is expressed to be for the benefit of some one else.' And this statement is cited and approved by the supreme court of Indiana (Hanley *vs.* Heist, 86 Ind., 196; Am. Rep., 286; Holland *vs.* Taylor, 111 Ind., 121). In a case arising in Massachusetts, where, in pursuance of an understanding with the mother of the insured, he took out a policy payable to her, but, upon his subsequent marriage, surrendered it and received a new one payable to the wife, it was held that the mother's rights were not affected. In this case (Pingrey *vs.* National Life Ins. Co., 144 Mass., 381; 11 N. East. Rep., 111 Ind., 121), the court said: 'There appears to have been a full understanding between him (the assured) and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact it was made payable to her, and this was done with the intention of giving her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might, indeed, afterwards fail to pay the annual premiums. This, however, does not prevent it

from being a good trust. An unrevoked trust is valid, even though there is an express power of revocation' (Stone *vs.* Hachett, 12 Gray, 227). In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two full annual premiums, it would not lapse, and certain valuable rights would still exist under it. Under the circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority," citing numerous authorities.

Bacon on Ins., vol. 1, sec. 292.

To the same effect is Mr. May's text on the same question:

"A life policy and the money to become due under it belong the moment it is issued, to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment, or will, to surrender the policy and issue a new one, or by other act, to transfer the interest to any one else. This right cannot be affected by any acts of the assured subsequent to the issue of the policy, except it be a breach of the condition. * * * No admissions of the assured subsequent to the policy are admissible against the beneficiary."

May on Insurance, 3d ed., sec. 399, L.

"While the beneficiary lives no surrender of the policy without his assent, or non-payment of the premium after such surrender will defeat his right. A surrender of the policy by the husband for the wife is ineffectual if without her authority, * * * and although the policy may be forfeited for non-payment of premiums, yet non-payment of premiums after such an attempted wrongful surrender, without notice to the beneficiaries will not ferfeit the policy."

May on Insurance, 3d ed., sec. 399, P.

"Declarations made by insured concerning his health after the policy has been issued on his life payable to a third party, as, for example, to his wife, are not competent in an action brought by such payee on the policy, because the contract is made with the beneficiary and not with the party whose life is insured."

2 Bacon, Ben. Soc. and Life Ins., sec. 460.

"These declarations were all mere hearsay and cannot be used as against the plaintiffs. The insured, who made them, had no interest in the policy, most if not all these declarations having been made long before the policy was issued. Even if made afterwards, they were equally mere hearsay; he never did have any interest in the policy."

Schwarzbach *vs.* Pro. Union, 25 W. Va., 622, 648.

Statements and admissions of the insured, made subsequent to the issuance of a policy in which his wife is beneficiary, to the effect that the statements made by him in the application were untrue, cannot be used against her.

"The statements in question, then, are the declarations of a stranger, one who is neither a party to the suit, nor was, at the time of making them, acting as the agent of a party. * * * They were not admissions against interest, for they could injuriously affect only his wife's separate property."

Fraternal M. L. I. Co. *vs.* Applegate, 7 Ohio St., 293, 297, 298.

"The offer of the defendants to prove the statements of Fish, made in the fall of 1853, in relation to his intemperate habits, was properly overruled. Fish was not, after the issuing to the plaintiff of the policy in suit, a party in interest in that contract, and could make no statement or admission that would divest the rights of the plaintiff. He was not, in any manner, the agent of the plaintiff, after the issuing of the policy, and so could not bind him. It might, with equal propriety, be pretended that the defendants could prove, by the admissions of Fish, that he had resided in forbidden districts, or engaged in occupations prohibited by the policy, and so escape payment. One class of unsworn state-

ments of Fish would be about as admissible as the other, to discharge the defendants from their contract."

Rawls *vs.* Ins. Co., 27 N. Y., 282, 290.

"Although there is some conflict in the authorities, the decided weight of them holds that no statements of the insured, made after the issuance of the policy, are receivable in evidence to contradict the written statements contained in his application, where the policy is issued for the benefit of another. The insured in such a case is not a party to the record, has no interest in the policy, and, if he is to be considered as the agent of the beneficiary in procuring it, his agency ceases with its issuance, so that there is no legal ground upon which his statements can be received."

Grangers' Ins. Co. *vs.* Brown, 57 Miss., 308, 315.

To the same effect is the statement of Judge Brewer:

"The first and third points present the same question, and may be considered together. That question is this: Can the declarations of a party whose life is insured for the benefit of another, made long after the application and the contract, be received in evidence against the assured to impeach the truthfulness of the application? The contract is between the assured and the insurer. The parties are the same whether that which is insured is a human life or a building. There is this difference: that the life, being active, can by its conduct affect the contract even so far as to annul it, while the building, being inanimate and passive, has of itself no such power. But, aside from this, the rights and liabilities of the parties to the contract are the same. The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not a party in interest, as the whole benefit and interest inures to the assured. She is not his agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him."

Washington Ins. Co. *vs.* Haney, 10 Kansas, 395, 403.
See also Ins. Co. *vs.* Morris, 3 Lea (Tenn.), 101, 103, 104.

So if the court holds that the contract is dominated by the statute of 1877, that it cannot be waived by the parties by

stipulation to that effect in the contract, which is admitted in the Cohen brief of plaintiff in error, page 72, then surely we are entitled to an affirmance of the judgment, it being remembered that plaintiff in error says, page 70 of its brief, Cohen case:

"In the Hill case the policy was issued in 1886, and Hill died in December, 1890. *But the act of 1897 is not involved in the Hill case.*"

And of course it was not, because Mr. Hill died and the action was begun prior to the enactment of the statute of 1897. We respectfully submit that the judgment of the circuit court of appeals, as well as the judgment of the circuit court, should in all things be affirmed.

S. WARBURTON,
Attorney for Plaintiff in Error.

'EBEN SMITH,
Of Counsel.

Filed Dec. 16, 1899.

Supreme Court of the United States,

OCTOBER TERM, 1899.

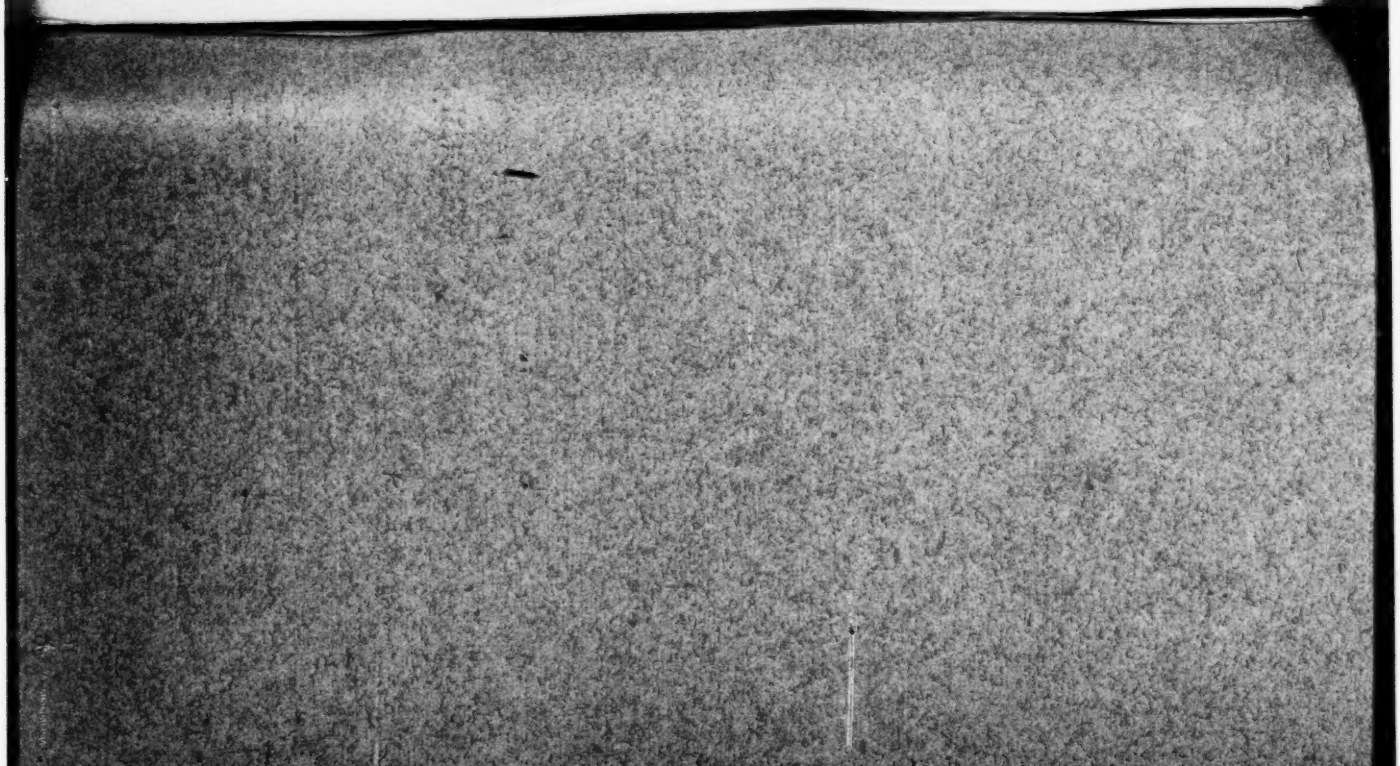
No. 488.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. WALTER B. ALLEN, as Administrator of the Estate of Samuel B. Stewart, deceased, Defendant in Error.

BRIEF OF PETITIONER

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
Counsel for Petitioner.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER SESSION, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, PETITIONER.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR, vs. WALTER B. ALLEN, AS ADMINISTRATOR OF THE ESTATE OF SAMUEL B. STEWART, DECEASED, DEFENDANT IN ERROR.

BRIEF OF PETITIONER.

STATEMENT.

In this case the two policies for $2500, each were issued February 18th, 1893. No premiums whatever were paid after the first premium of $47.75 on each policy, and the first default occurred February 18th, 1894. Stewart lived for three years afterwards, and died July 9th, 1897. This suit was commenced Dec. 28th, 1897.

The Mutual Life Insurance Company of New York, a corporation chartered as such by a special act of the

Legislature of the State of New York, in February, 1893, insured the life of Samuel B. Stewart by two policies, in the aggregate sum of five thousand dollars, the one being for the term of twenty years and the other an ordinary life policy, At the time of taking the insurance Stewart was a resident and citizen of the city of Seattle, Washington. The insurance company had complied with the laws of Washington requiring a foreign corporation transacting business therein to file with the Secretary of State a copy of its articles, and to appoint an agent at the principal place of business of the corporation in the State. The statutory agent was also the general agent of the insurance company in the State, and was engaged in procuring insurance for the company. The insurance company also had a general office at San Francisco for the conduct and management of its affairs on the Pacific Slope. The application for insurance and the physical examination of the applicant were made at Seattle; the application was there delivered to the agent of the company and by him transmitted to the general agent at San Francisco, who transmitted it to the principal office of the company in New York City, and in due course the policies of insurance were transmitted by mail to the San Francisco agent and by him to the agent at Seattle, who there, upon the receipt of the first annual premiums (namely forty-seven and 75/100 dollars upon the one, and sixty-six and 50/100 dollars upon the other), delivered the policies to Stewart, the insured.

The laws of the State of Washington confer upon foreign corporations authority "to do and perform every act and transact every kind of business within this State in the same manner and to the same extent as corporations

incorporated and organized under the laws of this State are authorized to do under the laws of this State." (See Petition, p. 3.)

The application for insurance and the endorsements upon the policy were made a part of the contracts. In the application it was provided that the policy "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health;" and also that "this application is made to The Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York." Among the endorsements on each policy is the following: "Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. * * * If this policy shall become void by the non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided." (See Petition, p. 7.)

Said Samuel B. Stewart continued to reside in Seattle until the time of his death, July 9th, 1897. No premium was ever paid subsequent to that upon the delivery of the policies. The insured was informed of the fact and was all the while aware of the amounts of the premiums and of when they were due, and not only neglected to make payment, but refused to do so. He was also aware that the company had entered and noted the policies upon its books as lapsed and forfeited for failure to make the pay-

ment of the premium falling due February 18th, 1894, on each of the policies. There was a mutual knowledge and understanding on the part of the insurance company and said Stewart that both were treating, the policies as terminated from and after February 18th, 1894. Stewart was all the time aware the company was acting upon this mutual understanding of the policies being lapsed and terminated by mutual consent and upon the faith of the arrangement abstaining from giving any notice to the insured. After the death of Samuel B. Stewart, Walter B. Allen was appointed by the Superior Court of Kings County, Washington, administrator of his estate, and having qualified as such, began suit upon the said policies December 28th, 1897, in the United States Circuit Court for the District of Washington, Northern Division.

The complaint set up the policies of insurance, including the application and endorsements upon each, which were made a part of the respective polices. Performance by the insured of all the conditions of the contract was averred, but controverted by the defendant company, as was also the allegation that the contract was made in the State of New York.

The statutes of New York are fully quoted in the petition.

The company, as a first defense to each policy, set up that it was a contract entered into in the State of Washington; that the insured had neglected and refused to pay the second annual premium falling due upon each policy, and in consequence it had lapsed and become forfeited according to its terms,

And as a second affirmative defense to each of the causes of action, the insurance company alleged that Samuel B.

Stewart was, prior to the issuance of the policies and till the date of his death in July, 1897, a citizen and resident of Seattle, Washington; that the company had complied with the laws of the state of Washington regarding foreign corporations transacting business therein, and had its agent at Seattle; that the application for the insurance was made at Seattle and there delivered to the agent of the company, who caused it to be forwarded to the home office in New York; that the policy was issued and transmitted to the agent at Seattle and there the first annual premium was paid and the policy delivered; that by the terms of the application which was a part of the policy, it was stipulated that the policy "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health;" and that the policy contained the following provision: "Notice that each and every such payment is due at the date given in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived." It is also alleged that neither Samuel B. Stewart nor any one on his behalf, ever paid or offered to pay any premium becoming due subsequent to that paid at the time of the delivery of the policy; that Stewart was at all times informed that default had been made by him in the payment of every such premium subsequent to the first; that the insurance company had noted and entered the policy of insurance upon its books as forfeited for failure to pay the annual premium falling due February 18th, 1894; that Stewart was so advised and consented to the forfeiture and termination of the policy, and that by the mutual knowledge and understanding of the insured and the insurance company the policy was regarded and treated

as terminated from and after the 18th of February, 1894; and relying upon such knowledge on the part of the insured and the mutual understanding, the insurance company refrained from giving any notice thereafter, and the insured knowingly acquiesced in this course to the time of his death in July, 1897.

A demurrer to the entire answer and to the separate defenses was sustained by the Circuit Court, and judgment rendered against the insurance company for the amount of the policies less the unpaid premiums. (See Petition, pp. 6, 7 and 8).

Upon writ of error the Circuit Court of Appeals affirmed the judgment of the Circuit Court.

Upon the foregoing abbreviated statement of facts, which are more fully set forth in the petition for certiorari, the petitioner asks this Court to grant a writ of certiorari.

ARGUMENT.

We present the following reasons why a writ of certiorari should be granted by this Court under Section 6 of the Act of March 3rd, 1891, (*26 Stats. at Large, 826*) requiring the record and cause to be sent up to this Court for its consideration :

THE STATUTE OF NEW YORK RELATING TO FOREIGN CORPORATIONS TRANSACTING BUSINESS IN THAT STATE IS NOT OPERATIVE BEYOND THE STATE OF NEW YORK.

By the terms of the statute it applies alike to foreign and domestic corporations. Its language is: "No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy." The language employed respecting the foreign corporation measures the

authority assumed as to the domestic corporation. It is a regulating statute as to business done in the State of New York and not beyond its boundaries. It is a statute outside of the contract of insurance, recognizing the contract as being complete in itself, independently of the statute. The further provision that proof of the sending or mailing of the notice may be established by the affidavit of an officer of the corporation, which shall be presumptive evidence that such notice was given, demonstrates that the statute was one designed to operate upon persons within the State of New York.

"The affidavit of any officer, clerk or agent of the corporation or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given.

(Petition, p. 2.)

It is not within the competency of the legislature of one state to enact rules of evidence for the use of another state or government.

Wharton, in his conflict of Laws, says (Sec. 752, 2nd Ed.):

"There can be no question that the *lex fori* is also to determine the competency and weight of evidence adduced to prove a litigated case. * * * On the one side, every case must be governed by the law in which it has its seat. On the other side, the court, in which such case comes to be tried, must direct its own procedure."

In 2nd Parsons on Contracts, 7th Ed., p. 718, the rule is thus stated:

"But on the trial, and in respect to all questions as to

the forms, or methods, or conduct of process, or remedy, the law of the place of the forum is applied."

It is thus seen the statute is one of public policy for the state of its enactment, establishing rules of evidence to be applied so far as the law itself extends. The conceded object of this statute is to relieve the negligent and improvident policy holder from the consequences of his carelessness in failing to pay the premiums upon his policy as they fall due. Taking into consideration the date of the enactment of the statute, 1876, and the condition of the mail service throughout the United States at that time, the period of thirty days fixed as sufficient for advising the holder of a policy of the due date of his premium and affording him opportunity of making payment of the same at the home office in New York City, would render the statute effectual for the purpose for which it was designed, if limited to the State of New York, but totally ineffectual, for practical purposes, if extended to all other parts of the United States. It will not be presumed that the legislature recognizing the evil to be remedied, would stop short of an ample relief.

THE STATUTE OF NEW YORK DOES NOT ENTER INTO THE CONTRACT OF INSURANCE, NOR INTO THE CHARTER OF AN INSURANCE COMPANY CREATED UNDER THE LAWS OF THAT STATE.

It is manifest the contract of insurance is complete without reference to this statute. The statute left the parties free to make such contract as they saw fit. No limitation is placed upon their right of contract. It is not until a breach has occurred in the non-payment of premium that the statute becomes applicable. It is against the consequences of a breach of the contract that it pur-

ports to afford relief. The legislature is at liberty to repeal such statutes without disturbing vested rights. If enacted, they come by way of grace; if repealed, they leave the parties standing upon their contracts as they have seen fit to enter into them.

In *Rosenplanter v. Provident Savings Life Assur. Soc. of New York*, 91 Fed., 728, Hammond, J., speaking of this statute and others of the same nature, says:

"They are not statutes of contract, but remedial statutes; and as to these the rule is that they are not a part of the obligation of the contract. It is not because of the effect of either of these statutes that we have under consideration that the plaintiff or the beneficiary has not incurred a forfeiture strictly according to the terms of the contract, but only that the legislature of New York, having authority over contracts made within the state of New York, has relieved her against a forfeiture so far as the statutes apply, but no further. One who grants a bounty may withdraw it; and it is a mistake to suppose that the right to it becomes perpetual because it has once been granted, where the nature of the gift is such that it must recur from time to time."

In affirming the case of *Rosenplanter* v. *The Provident Savings Life Assurance Society of New York* (96 Fed., 721), the Circuit Court of Appeals meets the question as follows:

"But the very zealous and learned counsel for the beneficiary have very strongly urged that as this contract was made while the act of 1877 was in force, the provisions of that act became so incorporated into the contract as to become a part of the contract itself, and that the provisions of the act of 1877, prohibiting a forfeiture of the

interest of the insured in the policy without a notice according to the terms and conditions of the statute, became as much a term and stipulation of the policy as if inserted therein by the parties themselves. Upon this assumption, they insist, that the act of 1877 could not be altered, or amended, or repealed, so as to subject the contract to forfeiture without the statutory notice, as such repeal or amendment would impair the obligation of the contract.

"To this we cannot agree. The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy without more ado. So with respect to the payment of the second half of the yearly premium; if not paid when due, the contract was thereby terminated. The act of 1877 interposed and for the benefit of the insured provided, that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. * * *

"Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as laws impairing the obligation of contracts or as an impairment of vested rights. *Conn. Life Ins. Co.* v. *Cushman*, 108 U. S., 51–65: *Ewell* v. *Daggs*, 108 U. S., 143; *Gross* v. *United States Mortgage Co.*, 108 U. S., 477; *Butler* v. *United States B. & L. Ass.*, 97 Tenn., 679; *Curtis* v. *Leavitt*, 15 N. Y., 15, 85. *Lewis* v. *McElrain*, 16 Ohio, 347; *Trustees* v. *McCaughy*, 2 Ohio St., 152; Cooley, Const. Lim., sides pages 293-378.

"Judge Hammond, who heard this case below, very admirably answered the argument that the act of 1877 so entered into the contract as to make its repeal an impairment of its obligations, by saying:

"'If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and of course the law could not make another contract for them. Wherefore, it would be enforced by the courts as the agreements of the parties; but the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice as required by the act of the non-payment of premiums before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract which it was entirely competent for the legislature to withdraw, alter or amend, as to it might seem best.

"'Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel. That is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but if the legislature has the power to import into an existing contract such a regulation for giving notice

without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary.'"

In the case of *Ewell v. Daggs*, 108 U. S., 143, it was held that the repeal of the statute of Texas which made contracts void for usury, acted retrospectively and took away the right of the defendant to make the defense of usury, but that such a repeal was not legislation impairing the obligation of contracts. Mr. Justice MATTHEWS uses this pertinent language:

"The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. * * *

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that

whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract" (pp. 150–151).

In *Gross v. U. S. Mortgage Co.*, 108 U. S., 477, construing a statute which gave validity to a contract otherwise invalid, this Court, through Mr. Justice HARLAN, says:

"When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt."

It is thus seen the statute of New York does not enter either into the contract of insurance or the charter of the insurance company. The statute being one of remedy and of public policy, cannot extend beyond the borders of the state of New York. If it enters into a contract made outside of New York or comes by way of remedy for its breach, it does so as a stipulation of the parties, and not by the authority of the legislature. By the terms of this policy it did not become a contract until it was de-

livered at Seattle where the first annual premium was paid. This marks the radical difference between business done or a contract made by the insurance company in the state of New York and outside of that state. In the one case the policy of the law which is omnipotent, enters into the contract and controls the parties to it, while in the other, neither the statute nor its policy have a place, and therefore, as a statute and as a policy, it cannot enter into the contract or transaction.

IN VIEW OF THE UNCERTAINTY OF THE DECISIONS AS TO THE LAW CONTROLLING THE PERFORMANCE OF CONTRACTS LIKE THE ONE IN CONTROVERSY, THE OPINION OF THIS COURT WILL BE OF PUBLIC IMPORTANCE AND TEND TO SECURE UNIFORMITY OF DECISION.

The Court adopted the view that the policy was a New York contract and its provisions were dominated and controlled by the statutes of that state relating to insurance companies, and that compliance with such statutes was indispensable to a forfeiture of the policy for non-payment of the premiums.

It is true the application recites that it was made subject to the charter of the company and the laws of New York, and that payments are to be made at the home office of the insurance company. But it stands admitted that the insurance company had complied with the laws of the state of Washington respecting foreign corporations transacting business in that state in pursuance of the laws; that it there had its agent and was there carrying on its business; that the insured was from the time of making his application to his death, a citizen and resident of Seattle; that his written application for insurance was made and de-

livered to the company's agent at Seattle and by him transmitted to the New York office; that the policy of insurance was transmitted to the agent at Seattle and upon the payment there of the first annual premium was delivered to Stewart; that the contract expressly provided that it should not take effect until "the first premium shall have been paid and the policy shall have been delivered;" that the insured, throughout his life, admitted he had not paid any other than the first annual premium; that he was aware the company had cancelled the policy for non-payment as by its terms provided; that he acquiesced in the mutual understanding that the policy was lapsed and forfeited, and consented that the company should so regard it and abstain from giving notice.

The case in each of the elements going to determine where the contract was executed and by what law it should be governed, is substantially like that of the *Equitable Life Assurance Society* v. *Clements*, *140 U. S.*, *226*. where Justice Gray summarized the case substantially as follows:

The assured was a resident of Missouri and the application was signed there; the policy was executed at the company's office in New York and provided that the contract was set forth in the application and policy taken together. The application declares the contract shall not take effect until the first premium has actually been paid during the life of the assured. The two premiums were paid in Missouri. The answer admits the payment of the premiums and the petition alleges the policy was delivered in Missouri to the assured. The opinion then proceeds:

"Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either

party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri." (*P. 232.*)

Unrestricted freedom of contract is conspicuously made manifest in this policy; whatever else may be doubtful, there is no uncertainty left in respect to the intention of the parties in this respect. They agree that the notice contained in the policy is given and accepted by the delivery and acceptance of the policy and expressly waive any other notice, and declare the contract shall become void by non-payment of premiums. This freedom of contract was guaranteed by the law of the state of Washington where the contract was made.

In the case of *Liverpool and Great Western Steam Co.* vs. *Phenix Ins. C., 129 U. S., 397*, the court lays down the following rule:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country" (*p. 458*).

The *Brantford City, 29 Fed., 373*, is forcibly in point. A contract was made in Boston with local agents of the British Steamship Company, by the terms of which libellants were to ship cattle on a British steamer from Boston,

and deliver them at Deptford, England, for a freightage of eighty-five shillings sterling per head. The court says:

"2. The defendants contend, however, that, inasmuch as the cargo was taken on board of a British ship, and as the bill of lading was signed by a British master, for transportation to England, the stipulations of the bill of lading exempting the ship from liability for negligence and from loss by death, however occasioned, afford a complete defense; because such stipulations are valid by the laws of England. * * * The question presented is a very important one. All the steamship lines, whether domestic or foreign, that sail from this port, insert in their bills of lading substantially the same conditions. Considering the number and the magnitude of the shipments by these lines, and the very diverse views found in the text-books and decisions upon this branch of the conflict of laws, I have deferred a decision of the cause until able to give the questions involved something, at least, of the consideration their importance demands. The conclusion to which I have come is that our law must prevail, whether the question be viewed as a question of responsibility for a tort and for the construction and validity of the exceptions in the bill of lading, in a conflict of laws; or as a question of evidence and procedure; or as a question of comity as related to our national policy."

Cox v. *United States, 6 Pet., 83, 172, 203.*
Scudder v. *Union Nat'l Bank, 91 U. S., 406.*
The Pennsylvania Co. v. *Wm. Fairchild, 69 Ill., 260.*
McDaniel v. *The Chicago & N. W. Ry. Co., 24 Iowa, 412.*

THE PARTIES TO THE CONTRACT INTERPRETED IT AS A WASHINGTON CONTRACT.

Doubt as to the policy being a Washington contract

should be solved by the interpretation of the parties themselves placed upon it. In addition to the application being made, the premium paid and the policy delivered and the insured becoming a member of the association in the state of Washington, we have the admitted facts of the insurance company having its principal place of business at that of the residence of the insured; that he was fully apprised of the time when the first premium became due and of its amount; that he was also apprised of the fact that the insurance company was treating the policy as a Washington contract and relying upon the express stipulation that no other notice was contemplated than that specified in the policy of the due date of premiums; it had noted and entered the policy upon its books as lapsed and forfeited for non-payment of the second annual premium; that he acquiesced in and consented to this as a proper interpretation of the contract, and that throughout the remaining years of his life he agreed to the termination of the policy and so consented and acquiesced in this interpretation; that he knowingly induced the company to forbear from taking any other step to effect a termination of the contract, and that acting upon this agreement he had knowingly allowed four successive annual premiums to remain unpaid.

In *Railroad Co.* v. *Trimble, 10 Wallace, 367*, the Court says:

"It was referred to in the argument as showing the construction put by the parties upon the deed of Howe to Trimble of the 9th of July, 1844. Where there is doubt as to the proper construction of an instrument this feature of the case is entitled to great consideration." (*P. 377.*)

Nickerson v. *A. T. & S. F. R. R. Co., 17 Fed., 409.*

The state of New York has a declared statutory policy

respecting insurance companies transacting business within her boundaries. In some particulars it is restrictive and severely penal. The state of Washington, doubtless owing to her remote and somewhat isolated situation, as an inducement to population, capital and business enterprises, adopted the same policy of freedom of contract with domestic and foreign corporations as accorded to natural persons. The policy of New York cannot displace that of Washington within the latter state. If the place of the law governing the performance of a contract is uncertain and suit is brought upon it in the state where it was made, and by the policy of the laws of that state the express stipulations of the contract are valid, that fact should cause a court to decide the contract to be performed under the laws of that rtate rather than under the laws of another government where such stipulations must be regarded as illegal or the public policy of the government defeated.

In *Mutual Ben. Life Insurance Co.* v. *Robison, 54 Fed. Rep., 580*, a New Jersey insurance company insured a citizen of the state of Iowa. The insurance was solicited in Iowa, where the application and examination were made. The application was forwarded by the company's agent to Newark, New Jersey, where the policy was issued. The application for the policy stated: "That such contract shall at all times and places be held and construed to have been made in the city of Newark, New Jersey, and this policy does not take effect until the first premium shall have been actually paid." The premium was paid and the policy delivered in Iowa. If a New Jersey contract, the company was not liable. If an Iowa contract, it was liable, because the Iowa statute made the solicitor

and medical examiner agents of the insurance company, while the New Jersey statute did not. The court, at pages 584, 588, says:

"We are, therefore, justified in holding that unless the clause in the application (with reference to construing the contract as made in New Jersey) shall take the case out of the rule as clearly established with reference to the point under consideration, the contract set out in the petition herein, must be construed by the laws of the state of Iowa. * * * We are, then, justified in holding that so far as the Iowa statute above quoted may apply to the contracts of insurance at bar, the Iowa law is the law which is to govern and furnish the rule of construction, 'anything in the application or policy to the contrary notwithstanding,' and a waiver thereof, as claimed by plaintiff is ineffectual."

Wall v. *Equitable Life Assur. Soc.*, *32 Fed.*, *273.*
Berry v. *Indemnity Co.*, *46 Fed.*, *439.*
Equitable Life Assur. Soc. v. *Winning*, *58 Fed.*, *541.*

THE INSURED DID NOT KEEP THE POLICY ALIVE BY THE PAYMENT OF THE ANNUAL PEMIUMS, AND THE CASE WAS SHIFTED FROM ALLEGED COMPLIANCE WITH THE TERMS OF THE POLICY ON THE PART OF THE INSURED TO LACK OF STATUTORY NOTICE BY THE INSURANCE COMPANY.

The defendant in error alleged in the complaint that the insured agreed in the policies to pay the annual premiums of forty-seven and 75-100 dollars and sixty-six and 50-100 dollars in advance of the delivery of the respective policies, and each annual premium on the 18th of February thereafter during the continuance of the contracts; that he died July 9th, 1897; that he performed all the

terms and conditions of the contracts on his part to be kept and performed to the date of his death. This latter allegation was controverted, and it was also affirmatively alleged that payment had never been made of any premium subsequent to the first to the date of the death. No allusion was made in the complaint to the statute of New York.

Mr. Pomeroy in his work on Remedies and Remedial Rights, Section 556, says:

"The plaintiff is no longer permitted to aver the performance of the required act, and on the trial prove the circumstances which excuse such performance, or prove any other alternative than the one specifically alleged."

The case was shifted from alleged compliance with the contract of insurance to an unpleaded failure on the part of the insurance company to give certain notice required by the statute of New York. To have maintained a right of recovery under this statute it should have been pleaded.

Austin v. *Goodrich*, *49 N. Y.*, *266*.
Churchill v. *Onderdonk*, *59 N. Y.*, *134*.
Railroad Co. v. *Sturgis*, *44 Mich.*, *538*; *7 N. W.*, *213*.

THE ADMITTED FACTS SHOULD ESTOP THE ADMINISTRATOR OF THE ESTATE OF SAMUEL B. STEWART FROM RECOVERING ON THE POLICIES.

Unless the statute of New York enters into the Charter of The Mutual Life Insurance Company (and we trust we have demonstrated it does not) then a policy holder, who, through a number of years has pursued the course ad-

mitted in this case—who has, knowing of the amount and the due date of his premium, refused to pay it—who has knowingly consented to the noting and entry of the forfeiture of the policy by the insurance company, and afterwards agreed and consented to the termination of the contract, and with that understanding has knowingly declined payment of all future premiums and induced the company to refrain from mailing notice—should be estopped from afterwards claiming the benefits of the contract. And if he, living, would be so estopped, the representative of his estate must be also. It cannot be argued that the state of Washington has no public policy against fraud and misrepresentation and against rewarding parties for their own demerits and delinquencies. It has such a policy. It is the policy of the common law, operative wherever rules of conscience are enforced and wherever courts of justice close their doors against parties who seek to take advantage of their own wrong. The policy of the state of New York cannot be transported to Washington in order to override a policy so universal and controlling.

In *Jones* v. *Alliance Mut. Fire Ins. Co.*, *34 Atlantic Pa.*), *198*, an insurance policy provided that on non-payment of assessments after thirty days' notice, the insurer might collect the same with twenty-five per cent. additional for cost of collection, but made no provisions for a forfeiture for non-payment. Not having paid the premiums, the insured, after the destruction of the property, brought an action to recover the amount of the policy. The court says:

"The question, then, comes down to this: Was there, or was there not, an extinguishment of exceptant's policy in defendant company by mutual consent of both parties? If it is a fact that, when the exceptant neglected to pay his

assessment, his intention was and thereafter continued to be to abandon the policy; that the company acquiesced in that intention; and that, for any period of time thereafter, both understood that their relations were at an end, that the policy was dead,—such must be the legal effect given to their acts, and whether that effect be styled a rescission or a surrender or a cancellation or a forfeiture or an abrogation or anything else is quite immaterial. It certainly cannot be equitable for one of the parties to such an understanding, upon the subsequent occurrence of that which makes it desirable to him to hold the other to the original contract, suddenly to change his mind, and because of the omission to give that formal notice which either might have given, which would have put their mutual understanding beyond doubt or question; but the absence of which has not prejudiced or misled either in the least degree, to assert that the policy was still in force, and come down upon the other for performance of his part of the bargain when his own has remained deliberately unperformed." (*P. 199.*)

Johnson v. Oppenheim, *55 N. Y.*, *280* (*291*).
Bryant v. Goodnow, *5 Pickering* (*Mass.*), *228*.
Farlow v. Ellis, *15 Gray* (*Mass.*), *231*.
Weymouth v. Gorham, *22 Maine*, *385*.
York v. Penobscot, *2 Greenleaf* (*Me.*), *1*.

In *Johnson v. Oppenheim*, this principle is thus stated:

"When some formal act or acts are to be performed by a party as a condition precedent to some right, or to perfect a right of action or property, and the act as performed is defective or imperfect, and the adverse party, whose right it is to object and insist upon a more perfect compliance with the condition, makes no objection to the manner of its performance, but accepting the performance as perfect, places his objection to the claim and right asserted upon another distinct and independent ground, he

is held to have waived all objection to the formal or technical defects. * * * The rule rests upon the ground that the party by his silence has misled his adversary, and not having spoken when he ought, shall not be permitted to speak when he would. The principle has its most frequent application in actions upon policies of insurance, where there have been some defects in the preliminary proof of loss or of interest, which have not been objected to, but the claim has been resisted on other grounds."

CAN RECOVERY BE HAD ON A POLICY OF INSURANCE WITHOUT FIRST PAYING OR OFFERING TO PAY DELINQUENT AND UNPAID PREMIUMS?

The opinion of a majority of the court in the case of *Baxter v. Brooklyn Life Ins. Co., 119 N. Y. Rep., 450*, and cases adopting it, was followed as authority for a recovery of the insurance without first making payment or tender of delinquent premiums. The decision in that case was by a divided bench of four judges in favor and three in opposition. Andrews, J., with whom Earle and Gray, JJ., concurred, insisted that the payment or proper tender of of delinquent premiums was a necessary condition precedent. From his opinion we quote as follows:

"But it is a condition precedent to the maintenance of such action that the plaintiff must, before suit brought, have paid or tendered the premium unpaid. The plaintiff, under the statute of 1877, is not required as before to show that it was paid or tendered on the day fixed in the policy, but he must aver and prove that payment was made at some time before the action was commenced, or else no right of action has accrued. This is in accordance with the well-settled rule that in mutual promises the plaintiff seeking to charge the defendant, must aver and prove perfor-

mance on his part of that which was the consideration of the defendant's promise, and this as well where the promise of the plaintiff was to be performed before the day fixed for performance by the defendant, as where the performance of respective promises were concurred and independent."

Loud v. *Land Co., 153 U. S., 564.*
Phillips Co. v. *Seymour, 91 U. S., 646 (650).*

There might be some more plausible ground for violating this rule of law and practice in states where the distinctions between law and equity are abolished than in the federal courts wherein such distinctions are definitely preserved.

This court has said concerning the nature of such a contract:

"It is an entire contract of life insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * * Each installment (premium) is, in fact, part consideration of the entire insurance for life. It is the same thing where annual premiums are spread over the whole life. * * * The whole premiums are balanced against the whole insurance."

Ins. Co. v. *Statham, 93 U. S., 24 (30).*
See also Kellner v. *Ins. Co., 43 Fed. 623 (627).*

Notwithstanding the New York statute, therefore, and even if it be held applicable to this contract, there became due from Mr. Stewart to the company February 18th, 1894, and each succeeding year including 1897, the premiums of $47.75 and $66.50, and such premiums remained due at the beginning of this action.

Thompson v. *Ins. Co., 104 U. S., 252 (260).*
Insurance Co. v. *Unsell, 144 U. S., 439 (447).*

In the former of these cases, the court says:

"A fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has heretofore failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstance relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all."

In the latter case, the beneficiary relied upon a waiver as excusing payment of the premium at the time the same was due and as defeating the right of the company's forfeiture; but there was evidence in this case that payment of the premium had been tendered subsequent to the due date. In discussing this question, Justice Harlan, at page 447, says:

"If the plaintiff had sued on the policies or certificates *without having paid or tendered the amount due to the company*, the non-payment of which, at the time stipulated, was relied on to prove that the policies had become forfeited, that *fact would have been fatal to a right to recover, in any view of the case.*"

DOES THE GENERAL STATUTE OF NEW YORK RELATING TO BUSINESS OF LIFE INSURANCE COMPANIES AFFECT THE MUTUAL LIFE INSURANCE COMPANY CHARTERED UNDER A SPECIAL STATUTE OF THAT STATE?

Now the question to be solved here, is whether the special act of the legislature of the state of New York of April 12th, 1842, entitled "An Act to incorporate The

Mutual Life Insurance Company of New York," is affected by the general statute relating to insurance corporations transacting business in the state of New York. (*See Petition, pp. 1 and 2.*) This special act of the legislature is the charter of the corporation ; it is the fundamental law which governs it, except so far as the same has been altered by statutes properly passed. It is true that Section 18 of this act provides that the legislature may at any time alter or repeal this act ; but it never had altered or repealed it, except in 1851, when it passed an amendment to the act, which is of no importance here, and afterwards, in April, 1862, when it passed another amendment to the act which is of no importance in this case. No other act has ever been passed by the legislature of the state of New York amending the special act of the legislature to incorporate The Mutal Life Insurance Company of New York. Certainly the general statute cited in the petition does not alter the charter of this company ; certainly it does not decrease its power ; certainly it cannot it cannot affect any of its rights under the contract which it made with the state. It is in violation of statutory construction to hold that a special act of the legislature is altered, amended or repealed by general legislation, unless particular reference is made to the special act, or it is otherwise made clearly manifest that the special legislation was intended to be embraced within the general act. It may be subjected, indeed, to the general provisions of law under the police power which the state has a right to enact.

THE PENAL CONSEQUENCES RESULTING FROM OBEYING THE NEW YORK STATUTE WILL NOT BE ENFORCED IN ANOTHER STATE.

This company is required by the statute to send a notice

of the coming due of each installment of premium to the policyholder or his assignee, and if the court finds it has failed to do so in this case, what is the consequence? It must pay the penalty. Is the state of Washington going to enforce the penal laws of the state of New York, and collect from its disobedient corporations the sums which they have been mulcted in, for doing or not doing something which the laws of New York require to be done or to be left undone?

The authorities holding that states will not enforce the penal laws of other states within their jurisdiction are too numerous to cite. We cite only those which hold that the United States courts sitting in other states enforce only the laws of the states in which they are sitting, and will not enforce the penal laws of other states.

The Antelope, 10 Wheaton, 66.
Flash v. Conn, 109 U. S., 371.
Lyman v. B. & A. R. R. Co., 70 Fed. R., 409.
Huntington v. Attrill, 146 U. S., 657.
Texas v. Day Co., 41 Fed. R., 228.
Wisconsin v. Pelican Co., 127 U. S., 265.

We, therefore, argue that the general statute of New York respecting notice did not become a part of the charter of the insurance company and cleave to it going with it into other states and was not intended to affect either its being or its transactions outside New York.

American Bible Society v. Marshall, 15 Ohio St., 548.

MEANING OF THE STATUTE OF NEW YORK—WAS IT THE INTENTION OF THE LEGISLATURE TO PROTECT THE AMOUNT OF THE POLICY FROM FORFEITURE, IF NOTICE OF UNPAID PREMIUM WAS NOT GIVEN, OR ONLY SUCH PORTION THEREOF AS PREMIUMS ALREADY PAID HAD PURCHASED.

If the New York statute applies to this case and the penalties of failing to mail the notice prescribed by that statute are visited upon the corporation, what is the punishment? A mutual life insurance company is a mutual association of which every policy owner is a member, the corporation being but the agent or trustee of this association of individuals. By taking a life insurance policy and paying the annual premium he enters into partnership. One of the members of the association was entitled to have a certain statutory notice mailed to him by some agent of the corporation stating the amount of the premium or interest due on the policy, the place where the interest or premium is to be paid, and the person to whom the same is payable, the notice to state that unless the premium or interest then due shall be paid to the company or duly appointed agent within thirty days after the mailing of the notice the policy will become forfeited and void. This notice is not deposited in the mail, but the member is otherwise fully possessed of all the information such notice can impart and so confesses. He fails to pay his premium, not for want of notice, but for want of money, and from that time forward suffers his premiums to go unpaid. Shall he, under such circumstances, make the want of formal notice, though possessed of actual notice, his ex-

cuse for taking advantage of his own failure to mulct his associates in damages to the amount of his failure? Is such the intent of the legislature?

To construe a statute properly there should be an appreciation of the exact quality of the evil against which it was aimed, its extent, and its mischief. If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute, then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all things, the statute must be construed in a spirit of justice. It must not be extended beyond the remedy which is sought to be enforced, and particularly it is not to be extended so as to do injustice, or inconvenience, or absurdity. We are not to suppose that the legislature, in attempting to remedy a wrong, itself committed a greater wrong, or that in its attempt to remedy a hardship it has committed injustice.

Now let us look at this statute in the light of these principles. Contracts of insurance are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure the principal sum to be so paid, annual, or semi-annual, or quarterly installments are paid to the company. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid, and that they should be so paid on the day they are due, because life insurance takes into account not only the average human life, but compound interest upon the installments which are paid. To leave out either element would destroy the scientific theory upon which life insurance is based. The contract is not for a fraction of a year, or from one installment

period to another; although there is that sort of insurance, called "term insurance," and this statute expressly excludes that sort of insurance from its provisions. But the insurance for life is the insurance which we are now to deal with; and the policy before you in this case, which is the contract upon which the adjudication of this case is to be made, shows exactly what was to be done by both parties to the agreement. The contract is in two parts. One is a proposition in writing (the application) made in Seattle, in the State of Washington, February 17th, 1893, signed by Samuel B. Stewart and addressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as an inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy.

The policy contains the following provision:

"*If this policy shall become void by non-payment of premiums, all payments previously made shall be forfeited to the company except as hereinafter provided.*"

Now, here is the forfeiture which the statute refers to, this is the forfeiture which it is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to continue a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute as that, not only is the forfeiture waived, which in this case amounted to one year's premium, but that an effect shall be given to the policy the same as if

the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance company which is unnecessary in order to accomplish the non-forfeiture of the premiums. It is not necessary to go to this length in order to sustain the statute. The statute was intended to provide that notice should be given of the reccurrence of the payments, so that the policy-holder should not be taken by surprise, or affected by forgetfulness, oversight or sickness, and thus prevented from paying his premium on the very day it was due. It was an extension by the statute of an equitable interposition to prevent the forfeiture. This cannot be construed to bring about a greater forfeiture than it was made to prevent. It cannot be construed, without violating reason and justice, to mean that the policy-holder was forever discharged from his obligation to pay the premium because of the failure of this notice. There is something to forfeit. There is an accretion in the hands of the company of the surplus paid on each succeeding year the policy has been in force, which is forfeited unless the premium is paid. And to make sure the payment of which, the clause of forfeiture was inserted in the policy. *It is to prevent that forfeiture that the statute was passed; and in this case one year's premium has been paid. To do equity between the parties, you must deduct from that one year's premium the cost of carrying the insurance for one year as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case.* (See Record.)

This is rendered clear by the decision of the Supreme Court of the United States in the case of the New York Life Insurance Company *v.* Statham, 93 U. S., 24. The policy in this case had become, by its terms, void, and the reserve, or surplus, in the hands of the company had been forfeited to the company, in consequence of the condition of the country, being in a state of war with the southern states.

Says the court in that case :

" Non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

Then the court goes on to show that what there is in the hands of the company to be forfeited is surplus premiums over the amount which was necessary to carry the expired risk, and which is called in insurance circles the " reserve." That reserve is equitably the property of the insured ; and when he is forced to go out of the company by the unforeseen exigencies of war, he is entitled to take that amount with him.

That is all that could have been forfeited under any circumstances by the contract. Now the statute comes in and says that the company shall not forfeit that, unless it gives notice. This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die the whole amount of the insurance shall be paid over after deducting the back premiums. If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Stewart did in this case, then the company would hear of him as it has heard in this case, with a claim for

the amount insured, without any attempt whatever to pay the premiums which are confessedly unpaid and in arrears. No legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium.

This statute is, as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute was exhausted upon the failure to give the notice in February, 1894, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1895. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given."

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premium on the ground of a continuous failure to give notice.

Fisher v. *N. Y. C. & H. R. R. Co.*, *46 N. Y.*, *644.*

In this case the legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad

and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered. If, after suit was brought for the first penalty, the company did not avail itself of the notice and cease its illegal action, a suit might be brought for another, but in the quaint language of Judge Grover, who wrote the opinion, people should not be allowed to keep a "book account" of penalties.

In this case, had we been informed of the failure to give notice, we could promptly have corrected the omission, but then Mr. Stewart would have had to pay the premium within thirty days, which is just what he wanted to avoid.

A FATAL DEPARTURE FROM LAW TO LAW WAS MADE IN RENDERING THE JUDGMENT SOUGHT TO BE REVIEWED, BECAUSE THERE ARE NO PLEADINGS FOR SUCH A JUDGMENT TO BE BASED UPON.

The statute of New York was not pleaded nor the failure of plaintiff in error to comply with its provisions, nor was it even referred to in the complaint. Where the relief of the statute is relied upon as an excuse for non-performence, the statute itself becomes a necessary part of the pleading, as well as the non-compliance of the insurance company with its requirements, which relieves against the breach of conditions on the part of the insured.

Rosenplanter v. *Provident Sav. Life Assur. Soc., 91 Fed. 728.*

It is not a question as to whether the court takes judicial notice of the statutes of New York, but rather one of

departure from law to law in the pleading. Whether a party who pleads a specific contract and performance on his part of its conditions, as his right to recover shall be permitted after performance has been controverted, to confess his non-compliance and shift his right of recovery to an unpleaded statute of a foreign state and assert non-compliance with its provisions on the part of defendant, and adopt the defendant's non-compliance with the unpleaded statute as his own excuse for non-compliance with the conditions of the contract alleged in his complaint. The right of action alleged and abandoned is the act of the party; that not alleged but relied upon is the act of the legislature of New York. With performance of the conditions alleged the right of action is perfect regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. If the statute of New York, instead of performance of the conditions of the contract by defendant in error, affords the ground of recovery, then pleading of the statute is indispensable.

Union Pacific Railway v. *Wyler, 158 U. S., 285.*

In the case cited, a party sued the railway company for a personal injury, basing his right to recover upon the general law of master and servant. After the cause had been transferred to the Federal Court and remained in litigation for a number of years, the plaintiff amended his complaint so as to bring himself under the fellow-servant act of the State of Kansas. Upon amendment being made, the defendant interposed the statute of limitations as to an original suit begun at the date of amendment. Mr. Justice

White in delivering the opinion of the court, adopted the following definitions and illustrations of departure:

"Coke upon Littleton, 304 *a*, says: 'When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of Parliament. So when in his former plea he intituleth himself generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.'

"Comyn's Digest, 'Pleader' (F. 8.), states the same rule, and gives the following illustrations of departure:

"'In debt on bond by sheriff against his bailiff to pay him 20d. for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for A; defendant rejoins Stat. 23 H. 6, and 3 G. it is a departure; for pleading he has had and rejoining he ought not to pay; and for pleading common law plea, and rejoining a statute. *Balantine* v. *Irwin*, *M. 4 G. 2*, *C. B. Fort*, *368*.

"'So, if a man avows, for that A being seized in fee granted to him a rent, and the defendant pleads, nothing in the tenements at the time of the grant, and the plaintiff rejoins that A. was *cestuy que use* in fee, which use is now executed by the statute of uses; this is a departure.' *Pl. Com. 105 b.*

"Chitty on Pleading, *1*, *pp. 674*, *675*, states the principle as follows: 'A departure may be either in the substance of the action or defence, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament.'

"Stephen on Pleading, *pp. 412*, *413*, thus elucidates the point: 'These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also (*a*) departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law, in his declarations, and

on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder.'

"Gould on Pleadings, *pp. 423, 424*, says:

"'When the matter, first alleged as the ground of action or defence, is pleaded as at common law, any subsequent pleading by the same party, supporting it by a particular custom, is a departure' (*pp. 290–291*).

And in applying the foregoing rules, says:

"A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the states the laws of other state are treated as foreign laws, which must be pleaded and proven. Sedgwick on Statutory and Constitutional Law, *363; Hempstead* v. *Reed, 6 Connecticut, 480; Swank* v. *Hufnagle, 111 Indiana, 453; Root* v. *Merriweather, 8 Bush, 397.* Although this rule is not invariably adhered to, it is part of the law as administered in the state of Missouri.

Babcock v. *Babcock, 46 Missouri, 243.*

"The suit here was brought in a Missouri court, and was necessarily controlled by the law of that state.

"It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound,

it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. It is true that the Federal courts take judicial notice of the laws of the several states. *Priestman* v. *United States*, *4 Dall. 28*; *Owings* v. *Hull*, *9 Pet. 607*; *Covington Drawbridge Co.* v. *Shepherd*, *20 How. 227*; *Cheever* v. *Wilson*, *9 Wall. 108*; *Junction Railroad* v. *Bank of Ashland*, *12 Wall. 226*. This rule, however, does not affect the present suit, which was commenced in the court of Missouri. Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes which is a matter of evidence. The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute." (*pp. 295-296.*)

The preserved distinction between legal and equitable remedies in the Federal courts prevents such a departure as was made in this case. It is not contended one is entitled to insurance without payment at some time and in

some form, of the premiums with which the insurance is purchased ; it is not claimed that failure to give the statutory notice operates as a payment. How, then, on a complaint that avers performance of all conditions, that is, payment of all premiums, is the common law court to enter into the field of accounting and ascertain what premiums have been paid and what have not, compute interest on the unpaid premiums according to the law of the forum of the state of New York, and render its judgment or decree for whatever equitable balance may be found due? Suppose such a practice adopted where a policy had been issued to a middle aged person immediately upon the enactment of the statute of 1876, and but a single annual premium paid, and death occurred about this time and an action should be brought upon that policy in the form adopted in this case. The aggregate of unpaid premiums and their accumulated interest would constitute an equitable setoff exceeding the amount of the policy. If, without pleadings framed for the purpose, the plaintiff is entitled to recover, why not the insurance company, the balance being in his favor?

THE STATUTE OF NEW YORK NEITHER ENTERING INTO THE CHARTER OF THE COMPANY NOR THE CONTRACT OF INSURANCE, WOULD NOT PREVENT THE PARTIES, SUBSEQUENT TO THE DELIVERY OF THE POLICY IN THE STATE OF WASHINGTON, FROM AGREEING AND CONSENTING TO DISPENSE WITH NOTICE.

By the terms of the contract it did not come into being till the premium was paid and the policy delivered at

Seattle; by the express terms of the contract, it is declared "Notice that each and every such payment (of premium) is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived." (Petition, p. 5.)

Freedom of contract to the foreign corporation obtained in Washington. The laws of that state gave to such corporation authority "to do and perform every act and transact every kind of business within this state, in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of the state." (Petition, p. 3.) The statute of New York did not enter into this contract in Washington. The parties were beyond the reach of the policy of the state of New York, therefore they were at liberty in that state to make such after arrangement as was mutually agreeable respecting notice of the due date of premiums. It is admitted in the record, they adopted the express stipulation of the policy on the subject; it is admitted that when the second annual premium fell due, the assured refused to pay it, though advised as to its date and amount, and that the company voted and entered the policy upon its books as lapsed and forfeited for such default. It also stands admitted that the insured was informed of this action of the insurance company and acquiesced in it, and that by mutual consent and agreement the policy was treated as ended, and all future premiums were left unpaid; and on the faith of such arrangement and consent, The Mutual Life Insurance Company abstained from giving any notice. (Petition, p. —; Record, p. —.)

IN THIS CASE RECOVERY IS SHUT OUT BY THE AMENDMENT OF 1897, TO SECTION 92 OF CHAPTER 690 OF THE LAWS OF NEW YORK OF 1892.

The policy was issued February 18th, 1893, when the first annual premium was paid, but no part of any premium subsequent to that time has ever been paid or tendered. The insured, Samuel B. Stewart, died July 9th, 1897. Action was commenced December 28th, 1897. It is thus seen that no premium had been paid for four years previous to the death of the insured, or for more than that time previous to the commencement of this action. It will be borne in mind that the express stipulation of the contract is, that non-payment of the premium when due renders the policy void. If, then, a right of recovery exists, it must be through the statute of New York, and upon the terms prescribed by the statute, and the suit must be brought within the time prescribed by the law which constitutes a part of the statutory right. It is through the grace of the legislature of New York that the right of action upon the forfeited policy is given, if at all, and one who relies upon it must must bring himself within the terms of the statute; one of which is the time of taking advantage of the favor it bestows.

The amendment by Chapter 218, Laws of 1897, is as follows:

"No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued." (Petition, p. 2.)

If it be maintained that the policy remained alive for

want of the statutory notice, it is none the less true that default was made in payment of the premiums due in each of the years 1894, 1895, 1896 and 1897, and has so continued to this date. The legislature of New York, as has been shown, did not touch the contract and its obligations, and did not enter into the charter of the company. This statute would, in case the business was transacted in the state of New York, relieve the insured against the consequences of a violation of his contract. By the express stipulation of the policy it became lapsed and forfeited by the non-payment of the premium when it fell due; but notwithstanding such forfeiture, the insurance company was forbidden to take advantage of it and declare the contract forfeited and lapsed, unless it mailed a certain notice; although the forfeiture had occurred, the company was, in a case where the statute applied, prevented from availing itself of that forfeiture or declaring it, till a proper notice was mailed. The insured did not pay his premium on the company's failure to give the notice. He was only relieved from the consequences of his violated contract. It is none the less, by its own terms, a forfeited policy, though the insurance company is not permitted to declare it such without first mailing the statutory notice. The language of the statute is: "No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed." (Petition, p. 1.)

When the amendment of April 18th, 1897, was enacted, if the laws of New York governed this contract, then both the insured and the beneficiary became advised by this amendment that if a year's time elapsed between the beginning of an action on the policy and the date of default in the last payment of premium, the action could not be

maintained. They ran this hazard. It could have been avoided by making payment of the defaulted premiums. This course they did not see fit to pursue, but rather ran their chances.

This view of the statute is clearly brought out in *Rosenplanter v. Provident Savings Life Assur. Society* before cited, 96 Fed., p. 721.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to renew the policy by the payment of the stipulated premium, but that the forfeiture should not be declared or be effective unless the default in the payment of the stipulated premium should occur after a particular notice had been given prior to the stipulated day of payment, or a default should continue after a particular notice and demand for payment had been given. Thus the law stepped in and in effect said: 'You shall not enforce the stipulation into which you have entered in respect to the effect of a default in payment of premiums unless you first comply with this statute by giving the notice herein required.' The subsequent repeal of this statute does not impair the obligation of the contract in respect to premiums which should mature thereafter. The repeal simply permits the contract into which the parties had entered to be enforced according to its own terms and conditions."

We quote from *Carter* v. *Brooklyn Life Ins. Co.* (*110 N. Y., 15*), *17 N. E., 396*:

"We are also of the opinion that the payment of each annual premium constituted a renewal of the policy within the meaning of the term "renewed" as used in the act. While it was provided by the policy that it should continue for the term of the natural life of the insured, it was expressly provided that this was upon the condition that he should pay the annual premiums as they became due

by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void, and of no effect; but, when paid, it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease, or a contract, it is not essential to wait until they have respectively expired; for, after that time it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its proper sense, is to refresh, revive, or rehabilitate an expiring or declining subject; but it is not appropriate to describe the making of a new contract or the creation of a new existence Webst. Dict.; Worcest. Dict. It would be at the option of an insurance company to re-execute a forfeited contract of insurance; and if the act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the act to make it apply to some existing policies, and confer some legal right upon their holders, to avoid a cause of forfeiture; and, if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should be any renewed policies thereafter or not. We are therefore of the opinion that the plaintiff's policy was renewed within the meaning of the act." (p. 399.)

And such is the view adopted in *Rosenplanter* v. *Provident Assurance Co.*, cited from above.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to *renew* the policy by the payment of the stipulated premium."

The right of action being derived through the statute, the time in which it must be brought becomes a part of the statutory right, and unless suit is instituted within such time the right of action is lost.

In distinguishing the rule of limitation with respect to actions given by the common law and those under the statute, in *Finnell* v. *Southern Kan. Ry. Co.*, *33 Fed.*, *427*, the court says:

"There is also another class of cases in which a cause of action, which does not exist at common law, is created by the laws of a state. Causes of action of that character only exist in the manner and form and for the length of time prescribed by the statutes of the state which created them, and if suit is brought on such causes of action in a foreign jurisdiction the limitation act of the state which created the cause of action may, of course, be pleaded. (p. 428.)

And in *The Harrisburg*, *119 U. S.*, *199*, this court expresses the rule as follows:

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts

the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." (p. 214.)

CONCLUSION.

Certiorari is a permissible remedy in a case like the one here presented. We cite as alike in principle the case of *Wabash Western Railway v. Brow, 164 U. S., 271.* We further call attention to *Saltonstall v. Birtwell, 164 U. S., 54,* wherein it having been held that the right of an importer to recover excessive duties exacted could not be recovered unless it was shown protest had been made at the time of payment (though made afterwards and within ten days after the ascertainment and liquidation of duties), and the judgment being affirmed by the Circuit Court of Appeals, this court granted a writ of certiorari, while in the case of "*The Kate,*" *164 U. S., Rep. 458,* certain questions being certified to this court, it caused the whole record to be brought up in order to determine a case involving, as we apprehend, questions of less gravity and less importance, and tending less to establish uniformity of decision than the case at bar.

Telfener v. Russ, 162 U. S. Rep., 170, was an action by Russ, the holder of a contract to purchase large tracts of

land from the state of Texas, against Telfener, to whom he had sold and assigned his contract, upon an alleged breach of the contract of assignment. A writ of certiorari was issued to the United States Circuit Court of Appeals for the Fifth Circuit.

So, also, in *Dashiell v. Grosvenor, 162 U. S. Rep., 425*, a patent infringement case where the decision of the Circuit Court of Appeals is final, as in the other cases cited.

In *The Conqueror, 166 U. S., 110*, this court issued its writ of certiorari, where the questions were involved as to whether a certain foreign built vessel purchased by a citizen of the United States and brought into the waters thereof, was taxable under the tariff laws of the United States, and what was the proper measure of damages suffered by reason of the detention during the time of seizure of such vessel. While In re Chetwood, the court, making the rule absolute in allowing a certiorari where the Circuit Court exceeded its jurisdiction in judging certain parties guilty of contempt in violating the order of the Court, made use of the following language (*165 U. S., 448*):

"By section 14 of the Judiciary Act of September 24, 1780 (*1 Stat. 81, c. 20*), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Court of the United States were empowered by Congress 'to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law'; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co. v. Jacksonville Railway, 148 U. S., 372, 380.* And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, *c. 517, 26 Stat. 826*, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be

allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice."

Regarding the differences of judicial opinion respecting a number of the questions raised, and the unsettled rule as to a number of the other questions presented, as well as the importance of a decision affecting a number of cases presented contemporaneously to this court, by petitioner, and still others pending in the Circuit Court of Appeals of the Ninth Circuit, and in the Circuit Court for the District of Washington, in which your petitioner is a party, as well the importance of a decision affecting numerous outstanding policies of The Mutual Life Insurance Company of New York, and other life insurance companies similarly circumstanced, it is respectfully urged that a writ of certiorari be issued out of this honorable court to bring the record and cause before it, in order that it may decide the entire matter in controversy, as if the case had been brought before the court by a writ of error.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY.
Counsel for Petitioner.

No. 451.

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

WALTER B. ALLEN, as Administrator of the Estate of SAMUEL B. STEWART, deceased,

Defendant in Error.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. MCKENNEY,
Of Counsel.



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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Petitioner & Plaintiff in Error, *vs.* WALTER B. ALLEN as Administrator of the Estate of SAMUEL B. STEWART, deceased, Respondent & Defendants in Error.	No. 455.

Writ of Error to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, plaintiff in error.

PRELIMINARY STATEMENT.

There is no difference between this case and the Phinney case so far as the Act of 1892 is concerned, but in this case as in the Hill case the questions of estoppel abandonment waiver and rescission arise upon the facts in the answer admitted by a demurrer.

I.

Statement of proceedings in Court below.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on the 28th day of December, 1897, to recover the sum of five thousand dollars ($5,000) with interest from July 9th, 1897, claimed to be due on policies of life insurance issued by the Mutual Life Insurance Company of New York (Rec. 2–11).

The answer was demurred to by the plaintiff (R. 22–24) and the Court sustained the demurrer to the answer and ordered judgment for the plaintiff Allen in the sum of $4,588 (Rec. 25).

An opinion was rendered by Hanford, J., in sustaining the demurrer and ordering judgment (Rec. 23). This opinion is simply to the effect that the case came within the rules laid down in the Phinney case.

The defendant excepted to the judgment (Rec. 26).

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District, and the judgment was there affirmed.

For opinion of Circuit Court of Appeals by Hawley, District Judge, concurred in by Gilbert & Ross, Judges (see Record, page 37). Also reported in 97 Federal Reporter, page 985).

This opinion affirms the Court below simply on the "legal principles" arrived at by the same Court in the Hill case.

In December, 1899, a petition for a writ of certiorari was filed by the defendant company in this Court with a certified copy of the record and brief. This position and

brief was submitted to this Court with brief for Allen opposing application for certiorari (see papers on file).

Writ of certiorari was thereafter granted by this Court Feb. 5, 1900, and filed.

This cause now comes before this Court on a writ of certiorari for hearing on the merits.

II.

Abstract of Pleadings.

The complaint in this action is to recover on two policies.

I.—As to the first policy the complaint alleges that on the 18th day of February, 1893, the defendant company issued and delivered to Samuel B. Stewart the first policy in question dated February 18th, 1893, for the sum of $2,500. The policy provided that the annual premium should be paid in advance on delivery of the policy. The policy further provided as follows:

> "PAYMENT OF PREMIUMS.—Each premium is due and payable at the Home Office of the Company in the City of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is hereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided.

2. As to the second policy the complaint alleges that on the 28th day of February, 1893, the defendant Company issued and delivered to Samuel B. Stewart a policy dated on that date for the sum of $2,500. This policy provided that the annual premium should be paid in advance on the delivery of the policy.

The policy contained the same clause as to payment of premium as was contained in the first policy.

3. That on the 9th day of July, 1897, the said Samuel B. Stewart died.

4. That the said Stewart during his lifetime duly performed all the conditions of the contract.

The Answer.

The plaintiff in answering admits the issuance of the contract but denies that the contract was made or delivered anywhere except in the State of Washington, and further denies the allegation, that Stewart during his lifetime duly performed all the conditions of the contract and alleges affirmatively.

1st. That the application was made in the State of Washington, the policy delivered in the State of Washington and the first annual premium paid in the State of Washington ; that the premiums due on the 18th days of Feb., 1894, 1895, 1896, and 1897, had not been paid, and that the policies by their terms had been forfeited.

2d. The answer further alleges that the application for each policy contained the provision that the policy shall not take effect until the first premium shall have been paid and the policy shall have been delivered during Stewart's good health.

3d. The answer further alleges that Stewart was at all times advised that default had been made by him in payment of the premiums due in 1894, 1895, 1896 and 1897, and that in his lifetime he never paid or offered to pay any such premiums, and that the policies were marked forfeited and lapsed by the defendant company, and Stewart was at all times advised that the defendant had treated the policies as lapsed and forfeited, and that Stewart consented to such forfeiture and termination of said policy of insurance, and with a mutual knowledge and understanding on the part of defendant that said policies were at all times terminated, and relying upon such knowledge and mutual understanding, the said defendant never subsequently mailed or served any notice to said Stewart and the said Stewart fully acquiesced therein.

Demurrer to Answer.

The plaintiff demurred to the answer on the ground that none of the defenses state in the answer facts sufficient to constitute a defense.

III.

Chronological statement of facts admitted by the pleadings.

1892, Act of 1892 passed.

1893, Feb. 18. Stewart, a resident and citizen of the State of Washington, executed an application at Seattle, Washington, to the defendant company for two policies of insurance on his life, for the sum of Two thousand five

hundred dollars ($2,500) each, payable to his executors, administrators or assigns. These applications were forwarded to the home office in the City of New York. Pursuant to such application, policies, as applied for, were issued bearing date February 18, 1893, and forwarded from the home office in New York to the agent at Seattle, and delivered then to Stewart in payment of the first premium.

1894, Feb. 18. Premium not paid.
1895, Feb. 18. Premium not paid.
1896, Feb. 18. Premium not paid.
1897, Feb. 18. Premium not paid.

Stewart was at all times advised and informed that default had been made by him in the payment of each of the above premiums.

1897, Apr. 5. Law of 1897 went to force.
1897, July 9. Stewart died.
1897, Dec. 28. Suit commenced.

IV.

Statement of the case required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised.

The first question is, whether the Statute of New York of 1892 applied or not to premiums which are not demanded to be paid within the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors (see Point I).

The second question is, whether or not under the circumstances the policy was or was not a Washington contract, governed and construed by the laws of Washington alone, and not by the Statutes of New York in question.

The question is raised by the sustaining of the demurrer to the answer and the assignment of errors (see Point II).

The third question is, whether if the premium notice statutes of New York apply their equitable and true construction aids the plaintiff in keeping the policy alive. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point III).

The fourth question is, whether if any statutory notice was required the sending of notice was not waived by Stewart, and whether actual knowledge possessed and acted upon obviated the necessity for statutory notice. The question was raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point IV).

The fifth question is, whether or not the policy in question was not terminated by waiver, estoppel, abandonment and rescission, and the question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point V).

The sixth question is, whether or not it is essential to the maintenance of this action that Allen should have paid or tendered the premiums before suit. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point VI).

V.

Statement of Questions in Issue as Presented in the Petition for the Writ of Certiorari.

FIRST.

Whether the contracts of life insurance upon which

the action was brought, are contracts entered into and governed by the laws of the State of Washington or the laws of the State of New York, and whether said statutes of the State of New York of 1892, requiring notice to be given as therein prescribed, applies to this case or at all in the State of Washington.

SECOND.

Whether actual notice possessed and acted upon by the insured at the time the premiums fell due obviated the necessity of the statutory notice prescribed by the statute of New York, the insured at the time residing in the State of Washington.

THIRD.

Whether, if such statute does apply, the parties could and did waive the notice therein prescribed.

FOURTH.

Whether it was competent for the Legislature of the State of New York, under the said general statute of 1892, to alter and amend the charter of your petitioner, and if so, whether your petitioner, being a corporation created and chartered under a special act of the Legislature of New York, was intended to be included in or affected by said general act.

FIFTH.

Whether it was the meaning of the Legislature of New York that the act of 1892 should apply to a transaction taking place in the State of Washington, as disclosed by the record in this case, and whether said

statute follows your petitioner beyond the limits of New York as a part of its charter, or whether the same is operative only within that State upon corporate business there transacted.

SIXTH.

Whether the public policy of freedom of contract conferred by its Legislature upon foreign corporations transacting business in the State of Washington, should be a controlling reason for determining the contract a Washington contract not affected by the statute of New York.

SEVENTH.

If it should be held that the general statute of New York of 1892, respecting premium notices, applies to this case, whether failure to give the notice prescribed by the statute can operate to render your petitioner liable for a greater measure of insurance than the amount of the premium paid will purchase.

EIGHTH.

Whether the failure to give notice of a particular premium maturing will have the effect of keeping the policy alive, notwithstanding subsequent premiums have been knowingly left unpaid.

NINTH.

Whether, although your petitioner failed to give the notice prescribed by the statute of New York, and the premiums due on each succeeding year prior to the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property without con-

sideration, to require your petitioner in case of the death of the insured, to pay the policy.

TENTH.

In the event that the statute of New York should be held to apply to this case, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

ELEVENTH.

Whether, in the event it is held that the statute of New York applies to this case, it is a statute relieving the insured from the consequences of a breach of his contract, or whether it enters into the being and charter of your petitioner, and becomes a limit upon its powers of contracting outside of the State of New York.

TWELFTH.

Whether defendant in error, not having begun his action until the 28th day of December, 1897, can, in any event, avail himself of the New York statute, the amendment of which of April 5, 1897, is as follows:

"No action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest, or portion thereof, for which it is claimed that a forfeiture ensued."

THIRTEENTH.

Whether it is not a fatal departure from law to law for plaintiff, alleging as his cause of action a policy of insur-

ance, and compliance with its terms, and admitting the defence of non-payment of premiums, to recover judgment because the defendant has failed to show compliance with the unpleaded statute of New York in regard to mailing notice of the due date of premium.

FOURTEENTH.

Whether under the charter of the defendant Company and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the Company.

VI.

Specification of Errors.

THE FOLLOWING ARE THE ERRORS, ASSIGNED BY THE PLAINTIFF IN ERROR, UPON WHICH IT RELIES FOR THE REVERSAL OF THIS CASE.

1. The said court of error, in sustaining the demurrer of the defendant and plaintiff in error to the first affirmative defense of defendant and plaintiff in error to the first cause of action. Assignment of errors first upon record, page 46.

2. The said court erred sustaining the demurrer of the plaintiff and defendant in error to the second affirmative defense of said defendant and plaintiff in error to the first cause of action. Assignment of errors 2nd, page 47.

3. The said court erred sustaining the demurrer of the plaintiff and defendant in error to the first affirmative defense of defendant and plaintiff in error to the second cause of action. Assignment of errors 3rd, page 47.

4. The said court erred sustaining the demurrer of the plaintiff and defendant in error to the second affirmative answer to the second cause of action. Assignment of errors 4th, record, page 47.

5. The said court erred sustaining the demurrer of plaintiff and defendant in error to the answer of defendant and plaintiff in error. Assignment of errors 5th, record, page 47.

6. The said court erred in granting judgment in favor of the plaintiff and defendant in error against the defendant and plaintiff in error for the amount of said judgment or any sum, and because it was manifest upon the issues formed in said cause that said plaintiff was not entitled to judgment. Assignment of errors 6th and 7th, record, page 47.

7. The court erred in not submitting said cause to trial upon the issues formed by the pleadings. Assignment of errors 8th, record, page 48.

POINT I.

The premium notice statute of New York, of 1892, never had any application to the Stewart policy, because that statute did not apply to the business of collecting premiums demanded to be paid outside the State of New York. The contract was not subject to this particular statute of New York, because by its true construction it had no application.

For argument on this point, see Point II, Phinney Brief, at page 59.

In his opinion in sustaining the demurrer HANFORD, J. alludes to the policy provision that payments may be made at the home office in New York, but he does not advert to the further provision that they may be paid elsewhere and that as a matter of fact the premium was paid in Seattle.

POINT II.

Under the circumstances surrounding the application for the issuance and the delivery of the Stewart policy in the State of Washington, it was a Washington contract, and under the true doctrine of the conflict of laws, the New York Statute of 1892 was not the law of this contract.

For argument on this point, see Phinney Brief, Point III, at page 79; also Cohen Brief, Point II. See also the Opinion of the California Court, in the case of Rosson *v.* Equitable, appended to the Cohen Brief.

POINT III.

But if this Court should hold contrary to our contention in Point I., as above, that the Statute of 1877 apply to this contract and to the business of collecting premiums outside the State of New York, then it is submitted that the equitable and true construction of the statute so found applicable is that the statute operated on the first default alone without notice and did not preserve the contract forever on successive defaults, and further that the forfeiture of the premiums already paid was all that was prohibited.

For argument on this point see Point IV., in Phinney Brief, page 94.

For discussion of the Act of 1897, see Cohen Brief.

POINT IV.

If the Court holds that the true construction of the Statute of 1892, required a notice to be sent Stewart unless waived, then it is claimed by the plaintiff-in-error the sending of any statutory notice was waived by Stewart by the express terms of the policy, and that actual knowledge, possessed and acted upon by Stewart, obviated the necessity for statutory notice.

For argument on this point see Phinney Brief, Point V, p. 116.

It is admitted by the demurrer to the answer that Stewart was at all times advised and informed that default had been made by him in the payment of every premium subsequent to the first premium paid at the delivery of the policy; and that Stewart in his lifetime never paid or offered to pay any premium due upon the policy subsequent to the first. That Stewart was at all times advised that defendant had so treated said policy as lapsed and forfeited, and Stewart was at all times advised he had not paid the premium due February 18, 1894, and consented to the forfeiture and termination of the policy, and that with a mutual knowledge and understanding on the part of defendant and Stewart, the policy was at all times by the said parties deemed terminated from and after the eighteenth day of February, 1894; and relying upon such knowledge and mutual undersanding, the defendant never subsequently mailed or served any notice of the due date of premiums to or upon Stewart during his lifetime, and Stewart, at all times knowing that defendant was treating the policy as forfeited and lapsed, and at all

times knowing that he had not paid or tendered payment of any premium upon the policy subsequent to the first premium, acquiesced in and agreed to the mutual understanding that the policy was lapsed and forfeited, and by mutual agreement and consent, both the defendant and Stewart agreed and consented to the lapsing and forfeiture of the policy of insurance from and after the eighteenth day of February, 1894.

POINT V.

The contract was abandoned by Stewart and this he had a right to do.

For argument on this point see Phinney Brief, Point VI, page 143.

In this case the facts of actual knowledge of the default and its effect, of a mutual rescission and abandonment, and acquiescence in the forfeiture are fully admitted as to both polices. (See Answer, Paragraph VI, p. 15, and Paragraph VI, p. 17).

A policy holder who through a number of years has pursued the course admitted in this case—who has, knowing of the amount and the due date of his premium, refused to pay it—who has knowingly consented to the noting and entry of the forfeiture of the policy by the insurance company, and afterwards agreed and consented to the termination of the contract, and with that understanding has knowingly declined payment of all future premiums and induced the company to refrain from mailing notice—should be estopped from afterwards claiming the benefits of the contract. And if he, living, would be so estopped, the representative of his estate must be also.

It cannot be argued that the State of Washington has no public policy against fraud and misrepresentation and against rewarding parties for their own demerits and delinquencies, It has such a policy. It is the policy of the common law, operative wherever rules of conscience are enforced and wherever courts of justice close their doors against parties who seek to take advantage of their own wrong.

POINT VI.

The alleged cause of action was not pleaded and there was a departure. See Phinney brief, Point VII.

POINT VII.

The judgment should be reversed.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. MCKENNEY,
Of Counsel.

Brief for Respondent for Petitioner

Filed Dec 30, 1899.

SUPREME COURT

UNITED STATES

OCTOBER TERM, 1899

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTIAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

WALTER B. ALLEN, AS ADMINISTRATOR OF THE ESTATE OF SAMUEL B. STEWART, DECEASED,
Defendant in Error.

BRIEF OF RESPONDENT IN ERROR

Frederick Bancroft

JOHN H. ALLEN

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Attorneys for Respondent.

IN THE

SUPREME COURT

—OF THE—

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Defendant in Error.

BRIEF OF RESPONDENT IN ERROR

ON THE PETITION FOR THE WRIT.

The respondent respectfully suggests to the court that while, under the law, certiorari is a permissible writ, as stated by the petitioner, yet this court will be "chary of action in respect to certioraris." As was stated by this court, speaking

through Mr. Justice Brewer, in Forsythe vs. City of Hammond, 166 U. S., 506:

"That while this power is co-extensive with all possible necessties and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

See also Am. Con. Co. vs. J. T., etc., Ry. Co., 148 U. S., 372; The Three Friends, 166 U. S., 1; Chicago, etc., Ry. Co. vs. Osborne, 146 U. S., 354; Lau Ow Bew vs. U. S., 144 U. S., 47; In re Woods, 143 U. S., 202; U. S. vs. Swan, 65 Fed. Rep., 647.

We submit that there are no facts connected with this case which should actuate the court in granting a writ. There are no conflicting decisions "between two or more courts of appeal," or "between the courts of appeal and the courts of a state," nor is there any matter involved "affecting the interests of this nation in its internal or external relations."

We contend that the decisions are uniform upon the propositions involved. The decision in the case of Roseplanter vs. Prov. L. Ass. Soc., 96 Fed., 721, referred to by petitioner, in nowise conflicts with the decision of the court of appeals in

this case. The mere fact that a number of suits involving the same question are pending should not affect this court, for the reason that it does not appear that the decisions in the cases will be conflicting. If this court should issue the writ simply because of the amount involved, and the number of suits pending, the reason for constituting the Circuit Court of Appeals, and for making its decisions final, in certain cases, would be circumvented.

In the case at bar the amount involved is less than six thousand dollars, and the decision announced by the lower court does not conflict with the decision of any other court.

The writ should be refused.

ON THE MERITS.

The questions involved in this case are:

(1) Whether the law of the State of New York relating to insurance companies, which provides that "No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium, or interest, or any portion thereof, except as hereinafter provided," and which provides that whenever any premium due upon any policy shall remain unpaid when due, a notice stating the amount of such premium, the place where the same should be paid, the person to whom the same is payable, be addressed and mailed to the assured, which notice shall state further, that unless said premium is paid within thirty days after the mailing of such notice, said policy shall become

forfeited and void, and providing further that a similar notice, issued prior to the maturing of said premium, shall have the same effect as one served subsequently, applies to policies of insurance issued to non-residents of the State of New York, or whether the same is limited to policy holders residing in the State of New York;

(2) Whether the policies sued on in this case were controlled by the law of New York;

(3) Whether the insurance company and the assured may waiive the provisions of the law; and

(4) Whether in suing upon a policy governed by the laws of New York it is necessary for the plaintiff to allege affirmatively the fact that no notice was given, or whether he may allege due performance on his part, and recover unless the defendant can affirmatively show compliance with the law as to notice and forfeiture of the policy.

We will present these questions briefly in the order mentioned above.

ARGUMENT.

I.

THE LAW OF THE STATE OF NEW YORK APPLIES TO ALL CONTRACTS OF INSURANCE MADE BY COMPANIES ORGANIZED IN SAID STATE, WHETHER SAID POLICIES ARE ISSUED TO RESIDENTS OR NON-RESIDENTS THEREOF.

A corporation has no power except such as is given it by

the state which gave it being. It is a creature of legislation and may be endowed with such powers as its creator sees fit to give. It does not enlarge these powers by transacting business with persons residing out of the state nor by transacting business in other states. Wherever it goes it carries with it its charter and the laws of its existence, and when a corporation goes into a foreign state and is permitted to do business therein without limitation, express or implied, it goes therein as it has been incorporated. As was said by the Supreme Court of Maryland in McKim vs. Glen, 66 Md., 484, 8 Atl., 130:

"It is a familiar principle, that a corporation and all who deal with it are bound by the law of its creation, and all such laws as may be legitimately prescribed for its government by the sovereign authority from which it derived its corporate existence."

As we understand it, this principle of law is firmly settled.

Insurance Company vs. Ficklin, 74 Md., 172; s. c. 21 Atl., 680.

Hebb vs. Insurance Company, 138 Pa. St., 174.

Rue vs. Ry. Company, 74 Tex., 479; s. c. 8 S. W., 533.

Gunn vs. Miller, 26 S. W., 280.

Relfe vs. Rundle, 103 U. S., 222.

Canada R. R. Company vs. Gebhard, 109 U. S., 527.

Black vs. Canal Company, 22 N. J. Eq., 422.

This court, in Canada R. R. Co. vs. Gebhard, supra, says:

"A corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, Bank vs. Earle, 13 Pet., 588, though it may do business in all places where its charter allows and the local laws do not forbid. R. R. Co. vs. Koontz, 104 U. S., 12. But wherever it goes for business it carries its charter, as that is the law of its existence, Relfe vs. Rundle, 103 U. S., 226; and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country, but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, WHICH BINDS THOSE IN LIKE SITUATION WITH HIMSELF, WHO ARE SUBJECTS OF THE GOVERNMENT, in respect to the operation and effect of their contracts with the corporation,

will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

And again:

"Every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations."

In Pennsylvania there is a law which requires insurance companies to have attached to the policy a copy of the application, and which provides, that if it is not so attached, it will not be received in evidence. P. L. 20, Act of May 11, 1881.

In Hebb vs. Insurance Company, supra, in construing this law the Supreme Court of Pennsylvania held that it applied not only to "Policies on lives and property of persons within this commonwealth," but to policies issued by Pennsylvania companies on lives and property without the state.

The highest court of the State of New York has held that such was the meaning of the Act.

Carter vs. Insurance Company, 110 N. Y., 15.

Baxter vs. Insurance Company, 119 N. Y., 450.

In these cases the facts stated do not show the residence of the parties, but they must have been non-residents, otherwise the question of the application of the statute would not have arisen.

Plaintiff in error calls attention to the fact that the wording of the Act is, "No life insurance company *doing business in the State of New York* * * *." We submit that the Act was so worded to include not only corporations formed in New York, but foreign corporations doing business therein.

II.

THE POLICIES SUED ON IN THIS CASE WERE GOVERNED BY THE LAWS OF NEW YORK.

We contend that the law of New York relating to the forfeiting of policies controls the policies sued on not only because of the fact that the law of the State of New York was binding upon the company and entered into all of its contracts as a part thereof, as stated above, but for the further reason that the policies were New York contracts. The application for the policies stated that they were to be issued and governed by the law of the State of New York. (Petitioner's brief, p. 13.) The application was made to the company at its home office in New York; the policies were issued in New York; all premiums were due and payable at the home office in New York; the loss was payable at said office, and the proofs of death were to be made there. An inspection of the policies will show that the policies were considered by both parties as being New York contracts. We call the court's attention to the following statements contained in the policies:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the City of New York * * * upon acceptance of said proofs at its home office."

Again:

"The annual premium * * * shall be paid in advance on the delivery of this policy, and thereafter to the Company, at its home office in the City of New York."

Again:

"In witness whereof the said Mutual Life Insurance Company of New York has caused this policy to be signed by its President and Secretary at its office in the City of New York."

"Paid-up Policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the amount required by the provisions of the Act of May 21, 1879, chapter 347, Laws of the State of New York." (Record, p. 6.)

And lastly:

"The Company declines to notice any assignment of this policy until the original assignment * * * shall be filed in the Company's home office."

The policies were prepared by the Company, and recog-

nizing the force of the statute, it attempted to evade it by the following clause: "Notice that each and every such payment due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notiice required by any statute is thereby expressed waived."

These facts clearly show that the contracts were New York contracts and the parties so considered them. They were not only issued in New York, but every act of performance was to be performed there.

See London Assurance Company vs. De Barriero, 167 U. S., 149, wherein this court, speaking through Mr. Justice Peckham, says:

"Under the circumstances, we think that the contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia by its agents, and that contract by its terms was to be performed in England. The parties to it understood and agreed that in case of loss or damage to the interests insured the same was to be reported to the corporation at London. * * *"

In the case of Andrews vs. Pond, 38 U. S., 13 Pe., 65, this court, speaking through Chief Justice Taney, says:

"The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance."

See also Insurance Company vs. Nixon, 81 Fed., 796, wherein the Circuit Court of Appeals for the Ninth Circuit,

speaking through Judge Ross, says, in referring to a similar contract:

"The place of its making, as well as the place of its performance, being the State of New York, there is no room for doubt that it is governed by the law of that state."

In that case as in the case at bar application was made and the policy was actually delivered, in the State of Washington.

That case was referred to and approved by the same court in The Eq. Life Insurance Company vs. Trimbell, 83 Fed., 85.

See also:

Wayman vs. Suthard, 10 Wheat., 48.

Prichard vs. Norton, 106 U. S., 124, 136, 141.

Bank vs. Hume, 128 U. S., 128.

Coghlan vs. R. R. Co., 142 U. S., 141.

Hall vs. Cordell, 142 U. S., 116.

Counsel for the petitioner cites, as holding to the contrary, the case of Rosenplanter vs. The Provident Life Assurance Society of New York, 96 Fed., 721. We submit that that case is not in conflict with our contention that the policy is governed by the law of the State of New York, but on the contrary it sustains such contention. The court holds that the contract was a New York one, and, proceeding, the court says:

"The effect of the prohibition against declaring a forfeiture of the interests of the assured under the contract was

to keep the policy alive as a valid subsisting insurance, notwithstanding the stipulations of the parties to the contrary. The duration of the policy, so long as it was dominated by the statute, was not dependent upon the payment of premiums on the day named therein, but upon payment within thirty days after the statutory notice should be given. The only way in which the policy could be terminated under the statute was by the failure of the insured to pay his premium upon notice 'mailed' thirty days before the premium was due, or by a notice of default and demand for payment within thirty days after mailing such notice. Baxter vs. Insurance Co., 119 N. Y., 450."

It will be noticed that the case of Baxter vs. Insurance Company is cited with approval.

The court holds that the policy is governed by the law of New York. That is what we contend for in this case. In that case, however, the policy was a term contract for one year, and the court held that the law of 1892 did not include such a policy.

THE AMENDMENT OF 1897 DOES NOT AFFECT THE POLICIES IN QUESTION IN THIS CASE.

The record shows that these policies were issued in 1893; that the assured died in July, 1897; that this suit was instituted December 28, 1897. (Record, pp. 3, 8, 19.)

We contend that the provisions of the act of 1892 became a part of the contract to the same extent as if the act had been incorporated therein, and therefore that same could not be affected by subsequent amendments.

But however this may be, the amendment was not in force at the time of the death of the deceased, and the rights of the parties became fixed at that time.

Again, this suit was brought within one year after the act took effect.

III.

THE PROVISIONS OF THE NEW YORK STATUTE CANNOT BE WAIVED BY THE ASSURED OR THE COMPANY, OR BY BOTH TOGETHER.

It is a well established principle that laws in existence are referred to in all contracts made under such laws, and that no waiver of the parties, nor stipulations in the contract, can change the law.

Hermany vs. Association, 151 Pa. St., 17.

Insurance Company vs. Ficklin, 21 Atl., 680.

Insurance Company vs. Leslie, 47 Ohio St., 409; s. c. 24 N. E., 1072.

White vs. Society, 163 Mass., 108.

Insurance Company vs. Pollard, 26 S. E., 421.

Griffith vs. Insurance Company, (Cal.) 36 Pac., 117.

The case of Insurance Company vs. Clement, 140 U. S., 226, was a suit upon a policy of insurance which the court held was governed by the laws of Missouri. There was a statute in Missouri which prescribed the rules of commutation. There was a clause in the policy which provided a rule of

commutation different and in conflict with the statute, and a relinquishment and waiver of all "right or claim to any other surrender value than that provided, whether required by a statute of any state or not."

Yet this court, speaking through Mr. Justice Gray, said:

"It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute * * * as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

The case of the Mutual Life Insurance Company vs. Robinson, 54 Fed., 580, cited by the petitioner on page 18 of its brief, so holds, the court saying: "We are then justified in holding that so far as the Iowa statute above quoted may apply to the contracts of insurance at bar, the Iowa law is the law which is to govern and furnish the rule of construction, *'anything in the application or policy to the contrary notwithstanding, and a waiver thereof as claimed by plaintiff is ineffectual.'* "

The case of Rosenplanter vs. Prov. L. Assur. Soc., 96 Fed., 721, cited by petitioner, and so strenuously relied upon by it, also sustains this contention, the court saying:

"The effect of the prohibition (of the statute) against declaring a forfeiture of the interests of the assured, under the

contract, was to keep the policy alive, as a valid, subsisting insurance, *notwithstanding the stipulations of the parties to the contrary.*"

It should need no argument to show the correctness of this rule. Statutes would be very ineffective if they could be defeated by contracts. The Legislature of the State of New York enacted a rule for the regulation of insurance companies and stated in what manner and under what circumstances they could declare their contracts forfeited. This matter is one of public interest and concern, and insurance companies should not be permitted, under the guise of an agreement, to forfeit contracts in a different manner from that which the Legislature outlines. It is against public policy to permit persons natural or artificial to evade, set aside or annul public statutes by contracts, and we know of no authority which sanctions it.

IV.

IN SUING UPON A POLICY THE PLAINTIFF MAY ALLEGE FULL PERFORMANCE UPON THE PART OF THE ASSURED AND NEED NOT SET FORTH NON-RECEIPT OF THE NOTICE REQUIRED BY THE NEW YORK STATUTE. THAT THE NOTICES WERE GIVEN AND THE POLICIES LEGALLY FORFEITED IS A MATTER OF DEFENSE.

The petitioner contends that as the respondent in his complaint alleged full compliance on the part of the insured and the plaintiff, it was a departure from law to law to permit a recovery because of non-failure of the defendant to

give the notice and to forfeit the policy in the manner provided by the New York statute. Plaintiff in error relies upon the case of the Union Pacific Ry Company vs. Wyler, 158 U. S., 285, as sustaining its position in this regard. We submit that that case is entirely different and is easily distinguished from the case at bar. That was an action in tort. This is one upon contract. That suit was originally commenced in a state court of Missouri, which did not take judicial notice of the statutes of sister states. In the petition as filed the plaintiff sought to recover for an injury sustained by reason of the acts of an incompetent servant of the defendant whom the defendant had retained in its employ after knowledge of his incompetency. The injury occurred in Kansas, and the petition was drawn upon the theory of the common law liability of negligence. The suit was afterwards transferred to the United States court, and a demurrer being filed to the petition, was sustained with leave to amend. Thereafter a second petition was filed which set forth that the injury was sustained by reason of the negligence of one of the defendant's servants, who was a fellow servant of the plaintiff, and rested the cause of action exclusively upon the negligence of a fellow servant of the plaintiff. But alleged further that by virtue of a Kansas statute every railway company doing business in that state was liable for damages sustained in consequence of any negligence of a fellow servant. The common law liability for damages sustained because of the retaining by the master in its employ of an incompetent servant with knowledge of his incompetency, was eliminated entirely. To this amended petition a demurrer

was filed upon the ground that the action had not been commenced within the time limited by law, and the court held, in determining whether the action was barred by the statute of limitations, that the action should be deemed commenced from the date of the filing of the amended petition, holding that a suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce a claim for damages caused by the negligence of a fellow servant which the common law did not permit but which was given by the statute of Kansas. The court saying:

"As the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the states the laws of other states are treated as foreign laws, which must be pleaded and proven. (Citing authorities.) Although this rule is not invariably adhered to, it is part of the law as administered in the State of Missouri. Babcock vs. Babcock, 46 Mo., 243. The suit here was brought in a Missouri court, and was necessarily controlled by the law of that state."

The court will notice that in the first petition no reference was made to the Kansas statute, nor was there any reference to the fact that injury was occasioned through the negligence of a fellow servant.

Suppose that in the first petition the plaintiff had set forth that he was injured by the acts of an incompetent servant of

his master, who had been retained by the master with knowledge of his incompetency, and then had proceeded and alleged that such servant was a fellow servant and that the plaintiff had been injured through the negligent acts of such fellow servant, and setting forth by proper plea the Kansas statute, would the court have held that there was any departure? We think not.

In the case at bar the plaintiff, defendant in error, set forth in his complaint the fact that the defendant was a New York corporation, the entering into the contracts of insurance, copying such contracts in haec verba, and the suit was originally instituted in the United States Court, which takes judicial notice of the public laws of all of the states of the Union. And we submit that the complaint stated a prima facie case and that it was for the defendant to plead affirmatively the facts showing a forfeiture, if any there were.

It is not necessary to plead, either by reference or by copy, the law of the State of New York. The doctrine that United States Courts take judicial notice of the laws of the several states of the Union, and that in actions in such courts it is unnecessary to plead or prove such laws, is firmly established.

Lamar vs. Micou, 114 U. S., 218.
Hanley vs. Donohue, 116 U. S., 1.
Bank vs. Franklyn, 120 U. S., 747.
Gormuley vs. Bunyan, 138 U. S., 623.
Merchant's Bank vs. McGraw, 59 Fed., 972.
Newburn vs. Robinson, 36 Fed., 841.

L'Engle vs. Gates, 74 Fed., 513.
Owens vs. Hull, 9 Peters, 607.
Ellwod vs. Flennegan, 104 U. S., 562.

The complaint should be construed therefore as though the New York statute had been incorporated in it.

Again, as we have shown above, it appeared from the complaint that the contracts of insurance were New York contracts. The New York statute therefore entered into and became a part of them, and they were governed thereby. This has been held repeatedly by a number of courts.

Baxter vs. Ins. Co., 119 N. Y., 450.
Defrece vs. Ins. Co., 136 N. Y., 144.
Osborne vs. Ins. Co., (Cal.) 87 Pacific, 616.
Griffith vs. Inc. Co., 101 Cal., 621.
Warner vs. Ins. Co., 100 Mich., 167.
Ins. Co. vs. Mullen, 34 Southwestern, 605.
Nixon vs. Ins. Co. (C. C. A.), 81 Fed., 796.
Phinney vs. Ins. Co., 67 Fed., 494.
Rosenplanter vs. Ins. Co. (C. C. A.), 96 Fed., 721.

If these authorities control, and we submit that this court, under the universal rule, should follow the construction placed by courts of different states upon their own statutes, it was not necessary for the defendant in error to plead any fact other than what was contained in his complaint.

The fact, if it was a fact, that the policies had been forfeited or that the assured had violated the contract, were matters of defense. It is generally held that parties do not have

to plead negative allegations, nor do they have to anticipate defenses and deny them in advance.

Canfield vs. Tobias, 21 Cal., 349.

Uhl vs. Harvey, 78 Ind., 26.

Dunlavey vs. Watson, 38 Ia., 398.

The allegations in the complaint, of which the plaintiff in error complains, are as follows.

"That he, the said Samuel B. Stewart, did during his lifetime do and perform all agreements, which, under said policy of insurance, he was obliged to do and perform." (Transcript, p. 9.) And further:

"That the said plaintiff has done and performed all acts and things necessary to be done and performed by him under and by virtue of said policy and contract of insurance." (Transcript, p. 10.)

We submit that these allegations were legally true, because, as we have seen, the law of the State of New York entered into and became a part of the policy—the policies were governed thereby—and there was no breach of the conditions of the policy by the assured until the defendant had fulfilled the requirements of the act. The insured is not considered in default until he has received the notice required by the act to be given him. In these statements we are borne out by the Court of Appeals of New York in construing the very statute which is now before the court. We again say that this court and all other courts, in construing the New York

statute, should give to such statute that construction which the highest court in New York gives it.

In Baxter vs. Insurance Company, 119 N. Y., 450, the complaint was based upon an insurance policy issued by a company doing business in New York, and the complaint contained an allegation that the insured had made payment of premiums acording to the terms of the policy, while in fact the plaintiff had not made such payments. An inspection of brief of counsel for appellant therein will show that the question was made by the insurance company that the plaintiff having alleged due performance and payment of all the premiums was not entitled to recover without proving the allegations as alleged. The same point as is raised by the plaintiff in error here.

In deciding the case, the court says, referring to the statute, p. 454:

"This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy. * * * (p. 455.) It is obvious that the statute, when imported into the contract, modified its condition in very material respects. The duration and validity of the policy is not then dependent upon payment of the premium on the day named therein, but upon payment within thirty days after the notice had been given. The condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to

pay the premium within thirty days after notice. The complaint alleges that the insured, after the time of the death, made the payment on the policy as agreed with the defendant. That he actually paid the premium necessary to keep the policy in life till the 24th of August prior to his death, was established and admitted. *It was not necessary to prove that he also paid the premium on the 24th of August, because the contract was not impaired by a failure to pay on that day* but by a failure to pay within thirty days after the defendant had served the statutory notice. THE STATUTE PRESCRIBES THIS NOTICE AS A NECESSARY CONDITION OF FORFEITURE, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. *In the absence of proof, on the part of the defendant, as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and the statute when read together."*

Petitioner criticises this case, yet the case of Rosenplanter vs. Insurance Company, 96 Fed., 721, relied upon by it, cites it with approval.

In Defreee vs. Insurance Company, 136 N. Y., 144, the same doctrine is reiterated and affirmed.

In the case of Mullen vs. Insurance Company, 34 S. W., 605, the Supreme Court of Texas in construing this New York statute and the effect of an allegation in the complaint of full performance, when in fact the payments had not been made.

says, after referring to Baxter vs. Insurance Company, supra:

"Viewed in the light of this construction, which this court must accept, it would seem that the plaintiff in error only alleged in his petition what was legally true, and only what was necessary to show a right to recover. While it is true that he failed to pay two of the matured premiums before his wife's death, yet, in the absence of notice, such failure had no effect upon his legal rights in the premises, and did not constitute a breach of his obligation to pay premiums."

The allegation in the complaint was, "That plaintiff and his wife (who was insured) had entirely and fully complied with the terms of their agreement in making the payments upon the said policy of the defendant."

We submit that upon a contract of insurance made in the State of New York, or one governed by the laws of New York, it is necessary, in order to make out a prima facie case, to prove only the contract, the death of the insured, proofs of death, the appointment of the executor, demand for payment, and that in the absence of any other proofs, the plaintiff would be entitled to recover. If this be so, and we do not think it will be disputed, it is not necessary to allege any further facts, for the allegations need be no larger than the proofs required, and other allegation than what is required to be proved is mere surplusage, and being so, a denial thereof raises no issue.

In the case at bar would it be contended for a moment that the plaintiff, in order to make out a prima facie case, would have to prove that no notice as required by the New

York statute was given him? Or would not the proof of the contract, proof of death, proofs of loss, demand for payment and the appointment of the plaintiff as executor, all of which were admitted, be all that was required until the defendant had shown a compliance with the New York statute as to giving notices of the due date of the premium? If the latter, then it was not necessary for the plaintiff to allege the failure to give the notice, and such allegation would be immaterial and a denial thereof would raise no issue.

The plaintiff in error contends that the case should have been submitted to the jury upon the issue formed by the general denials. The denial referred to by the appellant in error is the denial of the due performance on the part of the insured and defendant in error. These allegations were immaterial ones, were surplusage, and the denial thereof raised no issue whatever. The statute being a part of the contract—the contract being governed thereby—it was immaterial whether the premiums had been paid, until it was shown that the notice required by the statute had been given. Whether this notice had been given was solely within the knowledge of the company. The insured was dead. It was impossible for defendant in error to have shown that the deceased had never received the notice. We submit that if the matter had been submitted to a jury on this denial, proof on part of defendant in error of the fact that no notice had been given would not have been necessary until the company had shown affirmatively that one was given. The non-payment of premium did not work a

forfeiture—but a non-payment after due notice given as by statute required.

The making and delivery of the contracts, payment of first annual premium, death of insured, plaintiff's appointment as executor, furnishing of proofs of death, and demand for payment were all admitted.

The defendant in this case did not in either of the affirmative defenses claim or attempt to plead that it complied or attempted to comply with the New York statute. An inspection of the affirmative defenses will show that the facts alleged constituted no defense to the policies or either of them, and we think the demurrers thereto were rightfully sustained.

We respectfully submit that the judgment should be affirmed.

Frederick Bausman

JOHN H. ALLEN,
JAY C. ALLEN,
Attorneys for Respondent.

Syllabus.

MUTUAL LIFE INSURANCE COMPANY *v.* PHINNEY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 12. Argued January 22, 23, 1900.—Decided May 28, 1900.

Upon the showing made by the Court of Appeals, it is clear that that court had jurisdiction, and should have proceeded to dispose of this case on its merits, instead of dismissing it for want of jurisdiction.

The plaintiff in error is a corporation, organized under the laws of the State of New York, and doing business as life insurers in the city of New York. It had an agent in the State of Washington, to whom Phinney, a resident in that State applied for a policy on his life. The application stated that it was made subject to the charter of the company and the laws of New York. A policy was issued which provided that on its maturing payment was to be made at the home office of the company in New York, and on its receipt Phinney paid the first premium. The policy provided that he should pay a like premium for twenty years, if he should live so long, and that the policy should become void by non-payment of the premium, with a forfeiture of previous payments. Phinney failed to make the next annual payment. Then he surrendered the policy to the local agent. He died without having made that payment, or the next one which matured before his death. His widow was appointed his executrix. She presented to the company a claim for the amount of the insurance under the policy. It was rejected. This suit was thereupon brought. In its answer the company set up that the contract was not to be taken as a contract under the laws of the State of New York, but under the laws of the State of Washington, and the company asked this instruction, which the court declined to give. "If you find from the evidence in this case that the said Guy C. Phinney stated to the representative of the defendant in the State of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representative, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the non-payment of the said premium, this would constitute an abandonment and rescission of this contract by both parties thereto, and would put an end to the same; and if you find the facts so to be, you must find a verdict for the defendant." The jury trial resulted in a verdict and judgment for the plaintiff. This was taken in error to the Court of Appeals for the Ninth Circuit which dismissed the writ of error on the ground that it had no jurisdiction by reason of a failure on the part of the plaintiff in error to file the writ in the office of the trial court. *Held*:

Statement of the Case.

(1) That the Court of Appeals had jurisdiction;
(2) That, without deciding it, the court would hold for the purposes of this case that the contract was made under the laws of the State of New York, and was governed by the laws of that State;
(3) That it is to be presumed that each party knew what the laws of New York were, and neither could be misled by any statement in respect thereto on the part of the other;
(4) That there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as with any other contract, and if they chose to abandon it their action is conclusive.

After the company had once excepted to the refusal of an instruction which it had asked, and excepted to those which were given, it did not lose the benefit of such exceptions by a request that the court repeat the instructions excepted to, in connection with certain answers made to questions propounded by the jury.

On September 22, 1890, Guy C. Phinney, a resident of the State of Washington, applied to the Mutual Life Insurance Company of New York for a policy of insurance on his life for the sum of $100,000, payable to his executors, administrators or assigns. This application was forwarded by the local agent at Seattle to the general agent of the company at San Francisco, and by him to the home office of the company in New York city. By reason of such application a policy was issued to Phinney, bearing date September 24, 1890, forwarded to the general agent at San Francisco, by him to the local agent at Seattle, and by the latter delivered to Phinney, who received it, and at the same time paid the first year's premium, amounting to $3770. The policy provided that Phinney should pay the annual premium of $3770 on September 24 of each year thereafter for twenty full years, provided he should live so long, and also "this policy shall become void by non-payment of the premium; all payments previously made shall be forfeited to the company, except as hereinafter provided." This last exception referred to certain provisions as to surrender value and readjustment of the amount of insurance on the payment of a certain number of payments, none of which are material to the question at issue in this case. Prior to September 24, 1891, notices were sent by both the general agent at San Francisco and the local agent at Seattle to Phinney that his premium would be due on September 24, 1891. Twice between the time

of the receipt of this notice and the 24th of September, 1891, Phinney met Stinson, and requested him to accept his notes for the payment of the premium. This proposition was declined by Stinson, who declared at the time that he was unable to advance the premium for Phinney. Some time after September 24, 1891, (the exact date being unknown, but, according to the testimony from four to six weeks thereafter,) Phinney again met Stinson, and stated that he was prepared to pay the premium, but was told that it could not be accepted unless a certificate of health was furnished. No certificate of health was ever furnished. Phinney stated that he could not obtain it, as he had been rejected by another company a few days before, nor was there ever any formal tender of the premium. In December, 1891, or January, 1892, Stinson requested Phinney to allow him to have the policy to use for canvassing purposes, and Phinney thereupon surrendered the policy to the agent, with the statement that as the same had lapsed he had no further use for it. Stinson received the policy, and never returned it to Phinney. On September 24, 1892, the premium falling due on that day was neither paid nor tendered by Phinney, nor did he after the surrender of the policy in December, 1891, or January, 1892, ever take any action in regard thereto, or pay, or offer to pay, any premium thereon. On September 12, 1893, Phinney died, leaving his last will and testament, wherein he nominated the plaintiff as executrix. Nothing was done by her under this policy until July, 1894, although Phinney held policies in two other companies at the time of his death, proofs in respect to which were presented by the executrix within one month after his death. At that time she wrote to the insurance company a letter, in which she stated as follows:

"SEATTLE, WASH'N, *July* 11, 1894.

"The Mutual Life Insurance Co. of New York:

"Gentlemen: On September 24, 1890, my husband, Guy C. Phinney, took out a policy, No. 422,198, in your company in the sum of one hundred thousand dollars. He died in this city last September 12, 1893. Not being familiar with his affairs, and the policy being mislaid, I was not aware that he held such

a policy until a few days ago, when the matter was brought to my attention."

In addition, it appears that on the 16th day of September, 1893, in her application for probate of her husband's will, she filed an affidavit, which contained these statements:

"Real estate, consisting of lands in said King County, of town lots in the city of Seattle, and of improved city property, the exact description of all which is at this time unknown to your petitioner, but which is entirely community estate, the value of which is about three hundred thousand dollars; that there is personal property of various kinds, all of the same being community property of the value of about fifty thousand dollars; that the total estate of said deceased, including the community interest of your petitioner, who is the widow of the said deceased, does not exceed in value the sum of about three hundred and fifty thousand dollars."

In July, 1894, (evidently at the suggestion of counsel,) she presented her claim under the policy, which was rejected, and thereupon this suit to recover thereon was brought in the Circuit Court of the United States for the District of Washington.

At the time the application was made and the policy issued the following statute was in force in the State of New York:

"Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled an 'Act regulating the forfeiture of life insurance policies,' is hereby amended so as to read as follows:

"SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if

notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"Sec. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given." Act of May 23, 1877, Laws of 1877, c. 321.

In 1892, and after the first default in the payment of premium by Phinney and the surrender of his policy to the agent, Stinson, the following statute was substituted for the act of 1877:

"Sec. 92. No forfeiture of policy without notice.—No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason

of non-payment when due of any premium, interest or instalment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, instalment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, instalment or portion thereof, then due, shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, c. 690.

The application made by Phinney for the policy contained this statement: "This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York." The policy stipulated that on its maturing the insurance company would "pay at its home office in the city of New York." It also stipulated that the annual premium should be payable "to the com-

Counsel for Parties.

pany at its home office in the city of New York." The policy also contained this provision:

"Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

In its answer the company pleaded that the contract was to be taken as a contract made in the State of Washington, and not controlled by the laws of the State of New York, because the application stipulated that the contract "shall not take effect until the first premium shall have been paid and the policy shall have been delivered." In fact, the policy was delivered and the premium paid in the State of Washington. It also pleaded the other provisions in reference to the failure to pay the annual premium, and the waiver, abandonment and rescission of the contract by the assured under the circumstances hereinbefore named.

The case came on for trial on these pleadings before the court and a jury, and resulted in a verdict and judgment for the plaintiff for the amount of the policy, less the unpaid premiums. The case was thereupon taken on error to the United States Circuit Court of Appeals for the Ninth Circuit, which court dismissed the writ of error on the ground that it had no jurisdiction by reason of a failure on the part of the plaintiff in error to file the writ of error in the office of the clerk of the trial court. 48 U. S. App. 78. Thereupon application was made to this court, and the case brought here on certiorari.

Mr. Julien T. Davies for petitioner. *Mr. Edward Lyman Short*, *Mr. John B. Allen* and *Mr. Frederic D. McKenney* were on his brief.

Mr. Stanton Warburton for respondent. *Mr. A. F. Burleigh* was on his brief.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The first question naturally is in respect to the jurisdiction of the Circuit Court of Appeals. The transcript filed in that court, in addition to the record of the proceedings on the trial, which trial culminated in a judgment on October 17, 1895, contained: First, a petition for a writ of error filed by counsel for the insurance company, on December 14, 1895; then an order by the trial judge, allowing the writ of error and fixing the supersedeas bond at $125,000; an assignment of errors; a supersedeas bond, approved by the trial judge; a citation signed by him, and service admitted by counsel for the plaintiff, all these on the same day. In addition, a return by the marshal, showing personal service on the plaintiff of the citation; the writ of error allowed by the trial judge, and an indorsement thereon by the clerk of the trial court (by deputy) in the following language:

"Received a true copy of the foregoing writ of error for defendant in error. Dated this 14th day of December, 1895. A. Reeves Ayres, Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington. By R. M. Hopkins, Deputy Clerk."

On the hearing in the Court of Appeals an affidavit of the deputy clerk of the trial court was filed, which, after averring that the petition and assignment of errors, the orders granting the writ of error, and fixing the amount of the bond, and the bond, were each on file in his office and all bore the following indorsement: "Filed December 14, 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy Clerk;" stated that upon the filing of these papers he prepared a writ of error, issued and delivered it to R. C. Strudwick, one of the attorneys of the insurance company, who took the same from his office, and added:

"That a few minutes thereafter the said Strudwick returned to my office, and delivered to and lodged and filed with me said writ of error, with the allowance thereof indorsed thereon by the before mentioned judge, and at the same time delivered to

and lodged and filed with me a copy of said writ for the use of defendant in error.

"That said original writ of error remained in my office and in my custody from said 14th day of December, 1895, until the 4th day of January, 1896, at which time I transmitted the same, with my return thereto, to this honorable court.

"That the original citation herein, a copy of which appears on pages 395 and 396 of the printed record herein, was returned to and filed with me by a deputy marshal of the United States for the District of Washington, on the 18th day of December, 1895, and the same remained in my office and in my custody and control from said date until the same was transmitted to this honorable court, together with the writ of error and return thereto on the 4th day of January, 1896. It has not been my custom to indorse original citations and writs of error at the time they are filed with or served upon me, for the reason that I have deemed the same as writs of the Circuit Court of Appeals to be indorsed by the clerk of said court upon his receipt of the same with my return thereto; but, as a matter of fact, the writ of error and citation herein were actually delivered to and filed and lodged with me as above stated."

Upon these facts we are clearly of opinion that jurisdiction was vested in the Court of Appeals. The majority of that court, in sustaining the motion to dismiss, relied on the following decisions of this court: *Brooks* v. *Norris*, 11 How. 204–207; *Mussina* v. *Cavazos*, 6 Wall. 355; *Scarborough* v. *Pargoud*, 108 U. S. 567; *Polleys* v. *Black River Improvement Co.*, 113 U. S. 81; *Credit Company, Limited*, v. *Arkansas Central Railway Co.*, 128 U. S. 258; in the first of which it was said by Chief Justice Taney: "It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk or the day on which it is tested are not material in deciding the question."

In that case the question presented was one of limitations, and not what was necessary to constitute a filing. The statute requiring writs of error to be brought within a certain time, the

question determined was whether the mere allowance or issue of the writ constituted the bringing of the writ of error within the meaning of the statute, or whether, as was held, it was not brought, had not performed its office, until it had been filed with the clerk of the trial court. In this case there is no question of time. All the proceedings, with a view of taking the case to the appellate court, were had within less than three months from the date of the judgment. The transcript filed in the Court of Appeals made it clear that everything which the trial judge was required to do was done, the writ of error was allowed, the citation signed and bond approved, and also that the citation was duly served upon the counsel for the plaintiff, and service accepted. It also showed that a copy of the writ of error was received and filed by the clerk of the trial court, and while it is true that it did not show that the original writ of error was filed in his office, yet the affidavit made by the deputy clerk (which is not disputed) disclosed that it was so filed, and on the same day with the other proceedings for perfecting the transfer of the case to the Court of Appeals. Now, while it may be technically true, as said by the majority of the Court of Appeals, that the indorsement on the copy of the writ of error of its receipt for the benefit of the defendant in error, plaintiff below, was under section 1007 of the Revised Statutes, with a view to a supersedeas, and may not itself be sufficient evidence of the filing of the original writ, yet the affidavit of the deputy clerk, who had charge of the office, shows positively that it was left with him and filed. If it was left with him and he failed to indorse it as filed, can it be that his omission defeats the party's right to transfer the case to the appellate court? Is it within the power of a clerk to overrule the action of the Judge, and prevent an appeal or writ of error which he has allowed? When the Judge has done all that is necessary for him to do to perfect the transmission of the case to the appellate court, and the party seeking review has done all that is required of him, can it be that the omission of a clerk (if there was such an omission) can prevent the jurisdiction attaching to the appellate court? Obviously not. "When deposited with the clerk of the court, to whose judges it is directed, it is served."

Mussina v. *Cavazos*, 6 Wall. 355, 358. While we have always been careful to see that the required order of procedure has been complied with before any case shall be considered as transferred from a lower to a higher court, that the party seeking a review must act in time and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction. We are clear that upon the showing made the Court of Appeals had jurisdiction, and should have proceeded to dispose of the case upon its merits.

Coming now to the merits, many questions have been exhaustively discussed by counsel in brief and argument. One is, to what extent, if at all, the law of New York controls in respect to the policy sued on.

By the insurance company it is contended that it does not apply; that it operates only upon contracts of insurance consummated within the State of New York; that it commences "no life insurance company doing business in the State of New York shall have power," etc.; that it thus includes foreign as well as local insurance companies, and as it confessedly cannot control the operations or modify the contracts of foreign insurance companies made outside the State, the true construction is that it applies to both foreign and local companies only as to business done within the State; that as the application was signed by the insured in the State of Washington, and when received by the company in New York was there accepted only conditionally, and as the policy which was prepared and forwarded to an agent of the company in Washington contained an express stipulation that it should "not take effect until the first premium shall have been paid and the policy shall have been delivered," and as the premium was in fact paid and the policy delivered in the State of Washington, the contract was a Washington contract, and governed by the laws of that State and not by the laws of New York, *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226, 232; that the statement in the application signed by Phinney that it was made "subject

to the charter of the company and the laws of New York," by its terms refers only to the application, and does not make the laws of New York controlling in reference to the terms of the contract, which was evidenced by the policy subsequently issued; and that being a Washington contract, and there being no legislation in that State in respect to matter of forfeiture, by its terms it became forfeited on the non-payment of the second annual premium.

On the other hand, it is contended by the executrix that, whatever may be the effect of the statute upon foreign companies which may happen to be doing business within the limits of New York, it is as to local companies practically a modification of their charters and a statutory rule thereafter controlling all contracts made by them, whether within or without the State; that even if this be not true, yet, as the policy refers to the application and makes it a part of the contract, and as there is no law of New York which affects in any way an application as such, the statement therein, that it is made subject to the charter of the company and the laws of New York, must be understood as directly incorporating the laws of New York into the contract, or at least referring to them as containing the rules for its construction and enforcement; and also, inasmuch as by its terms, final performance (that is, the payment of the policy) is to be made in New York, the law of the place of performance is the law which governs as to the validity and interpretation of the contract. *Washington Central Bank* v. *Hume*, 128 U. S. 195 197, 206; *Coghlan* v. *South Carolina Railroad*, 142 U. S. 101, 109, and cases cited in the opinion.

We are not insensible of the importance as well as the difficulty of the question thus presented in these various aspects, but think that the case may properly be disposed of without any consideration or determination thereof.

We shall assume, without deciding, that the law of New York does control in respect to this contract, and still are of the opinion that the judgment must be reversed for error occurring on the trial, and error of such a character as in view of the testimony may render it unnecessary ever to consider the question to which we have referred. Confessedly, the insured did not pay

the annual premium due September 24, 1891, nor that due September 24, 1892, although he lived until September 12, 1893. It appears from the undisputed testimony that the insured knew when the premium became due in September, 1891. Twice he spoke to the local agent seeking to arrange for the payment of the premium by a note, and some three or four months thereafter he surrendered the policy to such agent. It is true that at the time of the surrender the agent told the insured that the policy was forfeited, or words to that effect, and that the insured said to him that as the policy had lapsed it was no good to him, and the agent might take it if he wanted it. But never thereafter until the time of his death, more than a year and a half, was anything done or said by the insured in respect to the policy; no suggestion of payment of premium or anything of any kind in respect to it. He treated the matter as abandoned, and gave up to the agent of the company the instrument by which the contract was evidenced. Further, after his death his widow, the plaintiff, filed an affidavit that the personal property of her husband's estate amounted only to $50,000, which, of course, was not true if she had a $100,000 policy in the defendant company. Not only that, she ignored the policy altogether for nearly ten months, although she promptly presented claims under other policies. As she testified that she knew of the existence of this policy her conduct is explainable only on the theory that she understood that, which the evidence affirms, her husband had abandoned the policy and surrendered it to the company. Upon these facts the defendant asked this instruction, which the court declined to give:

"If you find from the evidence in this case that the said Guy C. Phinney stated to the representative of the defendant in the State of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representative, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the non-payment of the said premium, this would constitute an abandonment and rescission of this contract by both parties thereto, and would put an end to the

same; and if you find the facts so to be, you must find a verdict for the defendant."

In lieu thereof the court charged as follows:

"Now, it is contended that Mr. Phinney and this company, acting through Mr. Stinson as its agent, arrived at an understanding and agreement that the policy should not continue longer in force; Phinney was to pay no more money, and that his rights and the policy were abrogated. Notwithstanding the provision of the statute of New York, that a provision in the policy itself waiving notice has no effect, and that the company can only forfeit the policy for non-payment of premium by mailing the prescribed notice, still it would be competent, and it was competent, for the parties mutually to agree to the cancellation of a life insurance policy if they saw fit to do so. And if the evidence in the case shows that Mr. Phinney did voluntarily, without being induced by any false representations or deceit to give up the policy, rescind the contract and give up the policy rather than to continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy so that it would no longer be a continuing contract. There is testimony in the case tending to prove that Mr. Phinney was unable to meet the second payment when it fell due, and by reason of his failure to make that payment, he voluntarily delivered up the policy to Mr. Stinson as an agent of the company, with the understanding, expressed at the time, that it was lapsed, that it was no longer a continuing contract in his favor. If there was a full and fair understanding between these two men in that matter, and they both treated it as an abrogated and annulled contract, and each relied upon that understanding, it would have the effect to terminate the policy, and the company would have the right to consider itself absolved from any obligation to give the statutory notice in order to forfeit the policy, because it would be unnecessary for the company to forfeit by legal proceedings what the opposite party had voluntarily relinquished. It is a question of fact, therefore, for you to determine from the evidence in the case, whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an

agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson, with an understanding, and whether relying upon that understanding the defendant company subsequently acted."

In view of the facts heretofore narrated, it is obvious not only that there was error in the action of the court in declining to give the instruction requested by the insurance company, and giving that which it did, but also that the error was material. The instruction given suggested a matter in respect to which there was no testimony, yet which, in view of other language in the charge, was quite sure to mislead. In reference to this matter of abandonment and rescission, the court in effect declared that it was binding, unless induced by false representation or deceit. There is not the slightest syllable in the testimony to suggest that the agent deceived the insured, nor that he made a false representation in the sense in which a false representation may avoid a contract. And yet, as the court had already ruled that the law of New York controlled, that there was no forfeiture until the notice prescribed by the statute of that State had been given, the jury must have understood that when the agent said that the policy had lapsed, he made a false representation, and, therefore, that the action of the insured, based upon that false representation, did not amount to an abandonment. But whether that statement of the agent was correct in matter of law is doubtful; whether true or false, or, more accurately, whether correct or not, in its interpretation of the law applicable to this contract, is immaterial. It was merely a statement of what he supposed the law was, and the insured was under the same obligations to know the law that the company, or its agent was. The jury evidently proceeded upon the supposition that the insurance company, located in New York, knew what the law of that State was; the insured, residing in Washington, did not, and when the agent stated what the condition of the contract was, he misrepresented the law of New York, of which the insured was ignorant, and, being ignorant, was not bound by any act based thereon in the way of abandonment or rescission. But surely no such rule as that obtains. When two par-

ties enter into a contract, and make it determinable by the law of another State, it is conclusively presumed that each of them knows the law in respect to which they make the contract. There is no presumption of ignorance on the one side and knowledge on the other. Reverse the situation. Suppose the insurance company had made this contract as a Washington contract, and there had been some peculiar provision of that State controlling all contracts made within the State: could the company, a corporation of New York, thereafter be permitted to say that it did not know what the law of Washington was; that the insured, as a resident of that State, must be presumed to have known it; that he did not communicate his information, and therefore it was not bound by that law, and that if he said anything in reference to it, it was a case of false representation or deceit? No one would contend this. And so when these two parties, the insurance company and the insured, dealing as we are now supposing in a contract which they mutually agree should be determinable by the laws of New York, it is an absolute presumption that each knew those laws, and that neither one could be misled by any statement in respect thereto on the part of the other. Whatever opinion either might express in reference to those statutes, was a mere matter of opinion. He was chargeable with knowledge, just exactly as the insurance company was. *Sturm* v. *Boker*, 150 U. S. 312, is decisive of this question. In that case the statement of the insured as to a question of law was insisted upon as conclusive, but this court said (p. 336):

"Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of opinion as to the law of the contract, and not a declaration or admission of a fact,

such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument.

"In *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, 337, it was said: 'Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.'

"So in *Brewster* v. *Striker*, 2 N. Y. 19, and *Norton* v. *Coons*, 6 N. Y. 33, and approved in *Chatfield* v. *Simonson et al.*, 92 N. Y. 209, 218, where it was ruled 'that the assertion of a legal conclusion, where the facts were all stated, did not operate as an estoppel upon the party making such assertion.'"

So, whatever the local agent may have said as to the condition of the contract, was a mere expression of opinion as to a matter of law in respect to which both parties were equally chargeable with knowledge. It seems to us clear that only because of the inference to be drawn from the rejection of the instruction asked by the defendant, and the giving of the instruction with this suggestion of false representation or deceit, can the verdict of the jury be accounted for.

Nor can we think that the action of the defendant in requesting, after the jury had returned and asked certain questions, which were answered by the trial judge, that he repeat the instructions theretofore given in respect to waiver and abandonment, is to be taken as an indorsement of those instructions. After it had once excepted to the refusal of an instruction which it had asked, and excepted to those that were given, it did not lose the benefit of such exceptions by a request that the court repeat the instructions excepted to in connection with certain answers made to questions propounded by the jury. It meant simply that if the court answered, as it did, the questions propounded by the jury, it ought to supplement those answers with a restatement of the instructions theretofore given, and asking that restatement was not an admission that they were correct, but simply a request that they should be restated so as to qualify the answers given to the questions.

In this connection we may be permitted to suggest that no afterthought of ingenious and able counsel should be permitted to disturb the understanding and agreement of the parties based

upon their belief as to what the law is, or to enforce a contract which both parties concluded to abandon.

A single further matter requires notice, and we mention it simply to indicate that we have considered, although we do not decide, the question involved therein: The contract of insurance is a peculiar contract, especially when made with a mutual insurance company, for although in terms a contract with a corporation it is in substance a contract between the insured and all other members of that company. The character of this contract was fully considered and discussed by this court in *New York Life Insurance Co.* v. *Statham*, 93 U. S. 24, and to that case we refer without quotation. Now, whether the insurance company, if the law of New York be applicable, could insist upon a forfeiture without giving the notice prescribed by the statutes of that State, and, enforcing it, forfeit all premiums paid, all obligation for the return of the surrender value, all right of the insured by subsequent payments to continue the policy in force, is one question. But it is a very different question whether the executrix of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated reserve. Ordinarily no one can enforce a contract unless on his part he performs the stipulated promise, and it may be that this rule is operative in this case. We do not care to decide the question, and only mention it for fear that it should be assumed we had overlooked it. It is a question which may never arise in the future litigation of this case, and until it necessarily arises we do not feel called upon to decide it.

For these reasons the judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court with instructions to award a new trial.

Mr. Justice Peckham did not sit at the hearing and took no part in the decision of this case.

MUTUAL LIFE INSURANCE COMPANY *v.* SEARS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 452. Argued March 14, 15, 1900. — Decided May 28, 1900.

In view of what has been already decided in *Mutual Life Insurance Company* v. *Phinney*, *ante*, 327, the court holds that it is needless to do more than note the fact that, as shown by the answer, after the insured had once defaulted in May, 1892, and a second default had occurred in May, 1893, application was made to him by the company, through its agents, to restore the policy, and that he declined to make any further payments or to continue the policy, and elected to have it terminated, which election was accepted by the company, and the parties to the contract treated it thereafter as abandoned, and that there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as any other contract; and if they choose to abandon it, their action is conclusive.

THIS, like the case of *Mutual Life Insurance Company* v. *Phinney*, *ante*, 327, just decided, is an action on an insurance policy issued by the company, the premiums on which were unpaid for years before the death of the insured. The facts, as disclosed by the pleadings, (and the case went off on the pleadings, without any testimony,) are that on May 18, 1891, the insurance company issued a policy to Stephen P. Sears, he being the beneficiary named in the policy as well as the insured. He paid the first annual premium and received the policy, but neglected to pay the premium due on May 18, 1892, and all subsequent premiums. He lived until March 30, 1898, and thereafter his widow, the plaintiff below, was appointed his executrix. The answer alleged non-payment of the premiums from 1892 onward, and also "that subsequent to the failure of the said Stephen P. Sears to make payment of the said annual premium falling due on said policy, May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after the said Stephen P. Sears was fully informed and knew that said policy had been by it declared lapsed and

void for non-payment of premium, this defendant, through its agents, applied to said Stephen P. Sears to make restoration of said policy by making payment of said defaulted premium and having the said policy restored to force, but that said Stephen P. Sears refused to make such payment and refused longer to continue said policy or make any further payments thereon, and then and there elected to have the same terminated, and this defendant, relying upon the said election and determination of said Stephen P. Sears, at all times subsequent thereto treated said policy as lapsed, abandoned and terminated, and relying upon the said conduct of said Sears, abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof."

A demurrer to this answer was sustained and judgment entered for the plaintiff, which was affirmed by the Court of Appeals, 97 Fed. Rep. 986, and the case was thereupon brought to this court on certiorari.

Mr. Julien T. Davies and *Mr. John B. Allen* for petitioner. *Mr. Edward Lyman Short* and *Mr. Frederic D. McKenney* were on their brief.

Mr. Stanton Warburton and *Mr. Harold Preston* for respondent. *Mr. Eben Smith* was on their brief.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

In view of what has been already decided in the case of *Mutual Life Insurance Company* v. *Phinney, Executrix*, *ante*, 327, it is needless to do more than note the fact that, as shown by the answer, after the insured had once defaulted in May, 1892, and a second default had occurred in May, 1893, application was made to him by the company, through its agents, to restore the policy, and that he declined to make any further payments or to continue the policy, and elected to have it terminated, which election was accepted by the company, and the parties

to the contract treated it thereafter as abandoned. As we held in the prior case, there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, that action is conclusive.

The judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed and the case remanded to the latter court, with instructions to overrule the demurrer to defendant's answer.

Mr. Justice Peckham did not sit in the hearing and took no part in the decision of this case.

MUTUAL LIFE INSURANCE COMPANY *v.* HILL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 453. Argued March 14, 15, 1900. — Decided May 28, 1900.

This case falls within the same rule as *Mutual Life Insurance Co.* v. *Phinney*, *ante*, 327, and *Mutual Life Insurance Co.* v. *Sears*, *ante*, 345, and is disposed of in the same way.

The case is stated in the opinion.

Mr. Julien T. Davies and *Mr. John B. Allen* for petitioner. *Mr. Edward Lyman Short* and *Mr. Frederic D. McKenney* were on their brief.

Mr. Stanton Warburton and *Mr. Harold Preston* for respondent. *Mr. Eben Smith* was on their brief.

Mr. Justice Brewer delivered the opinion of the court.

This case resembles the last two decided, in that it was an

action against the insurance company on a policy whose premiums had not been paid for some years before the death of the insured. The policy was issued April 29, 1886, to George Dana Hill for the benefit of his wife, if living at the time of his death, and if not for the benefit of their children. The insured paid the first annual premium, but none thereafter. He died on December 4, 1890. His wife died before him, and this action was brought in behalf of the children. The answer alleged, among other things —

"That pursuant to the conditions of the said policy, there became and was due to the defendant as a premium upon said policy of insurance on the twenty-ninth day of April, A.D. 1887, the sum of eight hundred and fourteen ($814) dollars, and the said George Dana Hill and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs herein failed, neglected and refused to pay to the defendant, at the time aforesaid, the said sum of eight hundred and fourteen ($814) dollars, or any part thereof, and ever since that time and up to the time of the death of the said George Dana Hill on the fourth day of December, 1890, the said George Dana Hill and the said Ellen Kellogg Hill, his wife, during her lifetime, and each and all of the plaintiffs, neglected and refused to pay to defendant the said sum or any part thereof, or any other sum or other thing of value whatever, by reason whereof the said policy of insurance became and was on the twenty-ninth day of April, A. D. 1887, according to the conditions aforesaid, void and of no effect.

"That at a time more than one year from the time of the issuance of the policy mentioned in the complaint, and during the lifetime of the said George Dana Hill mentioned in the complaint, it was mutually agreed between the defendant and the said George Dana Hill that the said contract of insurance should be waived, abandoned and rescinded, and the said George Dana Hill and the defendant then by mutual consent waived, abandoned and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder.

"This defendant alleges that the said plaintiffs, and each of them, should be, and are, estopped from, and should not be per-

mitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise given, to said George Dana Hill a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that unless the premium then due should be paid to the company, or its agents, within thirty days after the mailing of such notice, the policy, and all payments made thereon, should become forfeited, or any other notice prescribed by any statute or statutes of the State of New York, or any other notice than that hereinafter in this paragraph mentioned, for that, shortly prior to and after, and on said twenty-ninth day of April, 1887, this defendant, in writing, and also personally, notified and informed the said George Dana Hill, at said city of Seattle, that the premium of eight hundred and fourteen dollars, necessary to be paid on said policy for the continuance of said policy of insurance, was due and payable, and said defendant duly demanded payment of said premium in said sum, and, at the same time and place, tendered the receipt of the defendant therefor, duly signed by its president and secretary; and the said Hill, being fully so informed and advised in the premises, refused to make payment of said premium, or any part thereof, and then and there, intending, and for the purpose of inducing defendant to rely upon the same, informed defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but, on the contrary, he, the said George Dana Hill, intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or of any future premium accruing on said policy; and the said defendant, then and there, and ever since, relying upon the said representations and conduct on the part of the said George Dana Hill, was thereby induced to, and did, declare the said policy and contract of insurance forfeited and abandoned, and, in good faith, relying upon said conduct and representations on the part of said George Dana Hill, this defendant was induced to, and did, fail and abstain from giving or mailing any notice, whether prescribed by statute or other-

wise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon."

Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.

But it is said that the insured was not the beneficiary; his wife, and in case of her death, their children, being named as such; and that it was not in his power, by non-payment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged, not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, "failed, neglected and refused" to pay the premium. So we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is "neglected and refused," and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it.

Under those circumstances we think the case falls within the same rule as the preceding; and the judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court, with instructions to overrule the demurrer to defendant's answer.

Mr. Justice Peckham did not sit in the hearing and took no part in the decision of this case.

MUTUAL LIFE INSURANCE COMPANY *v.* ALLEN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 455. Argued March 14, 15, 1900.—Decided May 28, 1900.

Mutual Life Insurance Company v. *Sears*, *ante*, 345, followed.

THE case is stated in the opinion.

Mr. Julien T. Davis and *Mr. John B. Allen* for petitioner. *Mr. Edward Lyman Short* and *Mr. Frederic D. McKenney* were on their brief.

Mr. Stanton Wartburton and *Mr. Harold Preston* for respondent. *Mr. Eben Smith* was on their brief.

MR. JUSTICE BREWER delivered the opinion of the court.

This case is, in all material respects, similar to that of *Mutual Life Insurance Company* v. *Bessie F. Sears, Executrix*, just decided. The answer of the company, which was demurred to, and the demurrer sustained, contained these allegations:

"That neither the said Samuel B. Stewart, nor any one on his behalf, ever paid, or offered to pay, any premium, or any part of any premium due, or to become due or payable on said policy, save and except the first premium, which was paid upon the delivery of said policy, and which covered the period from the date of said policy until the eighteenth day of February, 1894. That the said Samuel B. Stewart was at all times advised and informed that default had been made by him in the payment of each and every premium, and the whole thereof, due on said policy, subsequent to the said first annual premium paid at the delivery of said policy; and that the said Samuel B. Stewart in his lifetime never paid or offered to pay any pre-

mium, or any part of any premium, due upon said policy subsequent to that paid upon the delivery thereof as aforesaid. That it was expressly in said policy provided that the insurance thereon was payable to the insured, Samuel B. Stewart, or his assigns; that the said Samuel B. Stewart never made any transfer or assignment of said policy of insurance; that the said defendant entered and noted said policy of insurance upon its books as forfeited and lapsed for failure to pay the annual premium falling due on said policy on said eighteenth day of February, 1894. That the said Samuel B. Stewart was at all times advised that defendant had so treated said policy as lapsed and forfeited, and notwithstanding said notice, and notwithstanding the said Samuel B. Stewart was at all times advised, he had not paid the premium due on said policy February 18, 1894, consented to the forfeiture and termination of said policy of insurance; and with a mutual knowlege and understanding on the part of defendant and said Samuel B. Stewart, the said policy was at all times by the said parties deemed terminated from and after the eighteenth day of February, 1894; and relying upon such knowledge and mutual understanding, the said defendant never subsequently mailed or served any notice of the due date of premiums to or upon said Samuel B. Stewart during his lifetime, and the said Samuel B. Stewart, at all times knowing that the defendant was treating said policy as forfeited and lapsed, and at all times knowing that he had not paid or tendered payment of any premium upon said policy subsequent to the first annual premium paid as aforesaid on the delivery of said policy, acquiesced in and agreed to the said mutual understanding that the said policy was lapsed and forfeited, and by mutual agreement and consent both the said defendant and said Samuel B. Stewart agreed and consented to the lapsing and forfeiture of said policy of insurance from and after the eighteenth day of February, 1894."

From this answer it distinctly appears that Stewart, who was both the insured and the beneficiary, knew when the second annual premium became due, was informed of his default in the matter of payment, and both he and the company agreed to

the ending of the contract. Under these circumstances, and without considering any other question,

The judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States for the District of Washington are reversed, and the case remanded to the latter court with instructions to overrule the demurrer to the answer of the defendant.

MR. JUSTICE PECKHAM did not sit in the hearing and took no part in the decision of this case.